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No. 12159 2578 Pockets

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United States  
Court of Appeals

for the Ninth Circuit

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In the Matter of

THE WESTERN PACIFIC RAILROAD COM-  
PANY, Debtor, THE WESTERN PACIFIC  
RAILROAD CORPORATION,

Appellant,

vs.

THE WESTERN PACIFIC RAILROAD COM-  
PANY,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

FILED

APR 29 1949



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Court of Appeals

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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Notice of Appeal.....	249
Answer and Return of Western Pacific Railroad Corp. to:	
Order to Show Cause, filed Sept. 23, 1946....	137
Answer and Return of The Western Pacific Railroad Company to Petition for Clarification, etc., filed Sept. 15, 1948.....	158
Appeal:	
Certificate of Clerk to Transcript of Record on	261
Notice of .....	249
Notice of (Amended).....	249
Order Extending Time to File Designation and Statement of Points on.....	250
Statement of Points on (DC).....	252
Statement of Points on (USCA).....	264
Stipulation and Order Extending Time to Docket (DC) .....	256
Stipulation and Order re Certain Documents in Cause No. 9714 be included in Record on (USCA) .....	266
Stipulation Designating Record on (USCA) .	265
Stipulation for Contents of Record on (DC) ..	257

	PAGE
Certificate of Clerk to Transcript of Record on Appeal .....	261
Final Order, filed Mar. 28, 1946.....	108
Memorandum of the Western Pacific Railroad Corp. in Support of Petition for Clarification, etc., filed Oct. 25, 1948.....	178
Names and Addresses of Attorneys.....	1
Notice of Appeal, filed Nov. 17, 1948.....	249
Amended, filed Nov. 29, 1948.....	249
Notice sent to Attorneys dated Nov. 1, 1948.....	248
Order Adjudging the Western Pacific Railroad Corp. Guilty of Contempt of the Final Order	147
Order Appointing Trustees, filed Sept. 23, 1935.	16
Order Approving Petition under Sec. 77, filed Aug. 2, 1935.....	2
Order Approving Plan of Reorganization for Debtor, filed Aug. 15, 1940.....	59
Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees, etc., filed May 21, 1945.....	104
Order Confirming Plan of Reorganization, filed Oct. 11, 1943.....	65
Order Denying Petition of Western Pacific Railroad Corp. for Clarification or Modification of Final Order, filed Oct. 29, 1948.....	248
Order Directing the Revesting of Properties of the Debtor, etc., filed Nov. 27, 1944.....	74

	PAGE
Order Extending Time to File Designation and Statement of Points, filed Dec. 23, 1948. . . . .	250
Order, Final (filed Mar. 28, 1946) . . . . .	108
Order Fixing Time for Presentation of Claims, filed Aug. 20, 1935. . . . .	10
Order Making Allowance to be Paid out of Debtor's Estate for Certain Expenses. etc., filed Oct. 23, 1944. . . . .	70
Order of the Interstate Commerce Commission, filed July 29, 1939, Report and. . . . .	22
Order to the Western Pacific Railroad Corp. to Show Cause, filed Aug. 30, 1946. . . . .	136
Petition of Western Pacific Railroad Company: For Order to Show Cause, filed Aug. 30, 1946. . . . .	115
Petition of the Western Pacific Railroad Cor- poration for Clarification or Modification of the Final Order, filed Sept. 30, 1947. . . . .	151
Points and Authorities in Support of Respond- ent's Answer and Return to Petition for Clari- fication, etc., filed Oct. 25, 1948. . . . .	217
Reply of Petitioner to Answer and Return of the Western Pacific Railroad Corp. to Order to Show Cause, filed Oct. 2, 1946. . . . .	144
Report and Order of the Interstate Commerce Commission, filed July 29, 1939. . . . .	22
Statement of Points on which Appellant will Rely, filed Jan. 17, 1949 (DC) . . . . .	252

iv.

PAGE

Statement of Points on which Appellant Intends to Rely, filed Jan. 26, 1949 (USCA) . . . . .	264
Stipulation and Order re Certain Documents Contained in Cause No. 9714 . . . . .	266
Stipulation Designating Record for Printing (USCA) . . . . .	265
Stipulation for Contents of Record on Appeal (DC) . . . . .	257
Stipulation and Order Extending Time to Docket Record on Appeal, filed Jan. 19, 1949 (DC) . . . . .	256
Stipulation and Order Extending Time to File Designation of Record and Statement of Points on Appeal, filed Dec. 23, 1948 . . . . .	250

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In the District Court of the United States, for the  
Northern District of California, Southern  
Division

No. 26591-S

In the Matter of THE WESTERN PACIFIC  
RAILROAD COMPANY,

Debtor.

In the proceedings for the reorganization of a  
railroad.

### ORDER

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 2, 1935, and filed herein this day, stating that such debtor is unable to meet its debts as they mature and that it desires to effect a Plan of Reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said section and has been filed in good faith, it is Ordered:

(1) That said petition be, and hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the debtor be, and it hereby is, authorized and directed, pending further order of the court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the debtor, wherever

situated, whether in this state, judicial circuit, or elsewhere and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the incomes, rents, revenues, tolls, issues and profits of said property; to collect all outstanding accounts and all dividends and interest on securities belonging to it; to exercise such sale, conveyance, exchange and release rights as are reserved to, or available to, the debtor, under outstanding deeds of trust, mortgages, trust indentures and similar instruments, and to use the proceeds of sale of all released property as provided in such instruments; all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor; and to make such advances to its subsidiary corporations as are necessary to protect the debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor, all of the foregoing powers to be exercised according to law, and subject to such supervision and control by the Court as the Court may exercise



by further orders entered herein. The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary expense and expense incident to reorganization of the debtor shall be subject to the prior approval of the Court.

(3) That the debtor is authorized, in its discretion, from time to time until further order of this Court; out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the property of the debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the debtor; ticket, traffic, car mileage and car per diem balances; interline accounts, freight and overcharge claims; interest on and installments of principal of equipment trust obligations; and amounts for car and equipment repairs now due or that may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facil-



ities, and such sums as may be necessary to comply with the obligations of the debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or any of them);

(c) The following claims incurred by the debtor within six months preceding the date of this order, in the usual and customary operation of its properties, and the conduct of its current business, to-wit: Wages, salaries, fees, and other charges due and payable for services rendered to the debtor, unpaid material and supply accounts incurred in the operation of said properties; unpaid and outstanding pay checks and wage checks representing labor actually performed for the debtor. The debtor is also authorized in its discretion to adjust, compromise and pay claims of shippers, consignees, or others in interest, for overcharges or reparation awards, and for loss, damage or delay to freight and baggage; also to settle and pay on behalf of itself and other carriers and private car owners, claims arising out of rate divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting shipments with transit or storage privileges and other charges or adjustments of like character, between carriers in the conduct of their joint business, regardless of when accrued.

(d) Pending further order of this Court in the

premises, the debtor hereby is authorized to pay pay checks, and like instruments issued to employees for services rendered to the debtor, whether before or during said six months' period, whenever the same are presented for payment.

(e) The cost of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds, and trustees' charges under indenture under which securities of the debtor have been issued.

(f) All monthly payments due from time to time under any existing pension or insurance system of the debtor.

(g) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein; such expense to be taxed as costs in this case.

(4) That the debtor shall be allowed until January 1, 1936 (unless the time be extended further by order of this Court), within which to disaffirm any contracts. Such disaffirmance shall be indicated by notice to that effect, in writing, served on the other party or parties to such contract, and filed of record in this proceeding, and continued operation by the debtor under any of said contracts,

within said period allowed for disaffirmances, shall not be deemed to conclude the debtor in respect of such election, or to constitute an election.

(5) That, pending further order of the Court in the premises, the debtor is authorized and empowered to institute or prosecute in any Court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in its judgment, for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or liquidate, by written agreement or consent judgments, any actions, claims, proceedings, or suits, now pending against the debtor, or which may hereafter be asserted, or be brought in any court, or before any officer, department, commission or tribunal, to which the debtor is, or shall be, a party, but no payments shall be made by the debtor in respect of any such claims accruing prior to the date of this order, in respect of any actions, proceedings, or suits, on such claims, without further order or direction of this Court except as may be provided in other paragraphs of this order and except such as may be permitted by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the debtor in defense or settlement of such claims, actions, proceedings, or suits, shall have the effect of establishing any claims upon, or right in, the property or funds in the possession of the debtor, that otherwise would not exist.

(6) That the debtor shall close its present books

of account as of the close of business on July 31, 1935. The debtor shall open new books of account as of the opening of business on August 1, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the debtor are presently deposited as shall be selected by the debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(7) That within sixty days after the entry of this order, the debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the debtor as of the close of business on July 31, 1935, and within fifty days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the debtor of the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the debtor.

(8) That all persons, firms and corporations, whatsoever and wheresoever situated, located, or domiciled, hereby are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, and enforcing liens upon, or in any manner

whatsoever disturbing any portion of the assets, goods, money, railroads, properties and premises belonging to, or in the possession of the debtor, or from taking possession of the same, or any part thereof, or in any way interfering in any manner to prevent the discharge by the debtor of its duties in the operation of said property and business, under the orders of this Court, or from bringing any new suits or actions, accruing prior to this date, in or before any Court from which an appeal or proceedings to review, can be taken only upon the filing of an appeal bond, as a jurisdictional or mandatory requirement.

(9) That all persons and corporations holding collateral heretofore pledged by the debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

(10) This Court reserves full power and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

/s/ A. F. St. SURE,  
District Judge.

Dated August 2, 1935.

[Endorsed]: Filed Aug. 2, 1935.



[Title of District Court and Cause.]

## ORDER FIXING TIME FOR PRESENTATION OF CLAIMS

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 20, 1935, and filed herein this day praying for an order determining a reasonable time within which the claims and interests of creditors and stockholders of the debtor may be filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and for such other authority in the premises as to the Court shall deem desirable, and after hearing counsel for the debtor and the Court being fully advised in the premises, it is accordingly.

Ordered, adjudged and decreed as follows:

First. All claims and interests of creditors and stockholders of the debtor shall be filed or evidenced in the manner herein provided, on or before September 15, 1935, excepting, however, claims against the debtor growing out of the current operation of the railroad properties of the debtor and not affected by the proposed plan of reorganization. No such claim or interest may participate in any plan except on order for cause shown unless filed or evi-

denced on or before September 15, 1935, and in the manner herein provided.

Second. The manner in which such claims and interests shall be filed or evidenced shall be as follows:

(a) For all purposes, except as hereinafter provided, the amount of the aggregate claims of the holders of mortgage bonds issued, assumed or guaranteed by the debtor or constituting a lien upon property of the debtor, and of equipment obligations guaranteed by the debtor or constituting a lien upon property leased to the debtor, shall be evidenced (subject to final allowance thereof) as to each class of such bonds and each series of such equipment obligations, by the filing with the Clerk of this Court a verified statement of the corporate trustees under the indenture or agreement securing such bonds or equipment obligations showing the principal amount of such bonds or equipment obligations outstanding, as shown by the records of such corporate trustee; and the amounts of such bonds and equipment obligations, if any, pledged to secure bonds of other issues, or other obligations of the debtor, shall be evidenced, except as the Court shall otherwise hereafter direct, by the filing with the Clerk of this Court of a verified statement of the pledgee thereof. For the purpose of being heard on any question arising in the proceedings or of participating in any plan confirmed by this Court, all such claims shall be evidenced by presentation of such bonds and/or equipment obligations or of certificates of deposit of any bank, trust

company or other depositary satisfactory to the Court representing, and entitling the holder thereto to the possession of ownership of, such bonds and/or equipment obligations, or, but only for the purpose of being heard on any such question, by presentation of the certificate of any bank, trust company or other depositary satisfactory to this Court stating that such bonds and/or equipment obligations are held by it for safekeeping or otherwise for account of the person or persons desiring to be heard.

(b) For all purposes, except as hereafter provided, the interests of the holders of Preferred Stock and Common Stock of the debtor shall be evidenced by the stock books of the debtor. For the purpose of being heard on any question arising in the proceeding or of participating in any plan confirmed by this Court, such interests shall be evidenced by presentation of the certificate or certificates representing any such stock, or, but only for the purpose of being heard on an such question, by the presentation of the certificate of any bank, trust company or other depositary satisfactory to this Court stating that the certificate or certificates representing such stock is or are held by it for safekeeping or otherwise for account of the person or persons desiring to be heard.

(c) All other claims or interests of whatever character shall, for all purposes, be evidenced (subject to final allowance thereof) by filing with the Clerk of this Court of verified proofs of claims in such form as may be approved by the debtor and as may be acceptable to this Court, and, unless other-



wise requested by the debtor and directed by this Court, such proofs of claim may be in substantially the form of the official forms for proofs of claim prescribed by the Supreme Court of the United States; and, unless and until requested by the debtor or otherwise directed by this Court, the originals of written instruments executed by the debtor on which a claim purports to be founded, need not be filed with such proofs of claim.

Third. All claims and interests of creditors and stockholders of the debtor shall in due course be allowed by this Court, or by a Special Master, should one hereafter be appointed, pursuant to such orders and directions in respect thereof as may hereafter be made by this Court, when evidenced as hereinbefore provided, unless this Court shall otherwise determine or unless objection to such allowance shall be filed with this Court or such Special Master (on or before such date as this Court may hereafter determine), in which case such claims or interests in respect of which such objections shall have been filed shall be proved before this Court or before such Special Master.

Fourth. The creditors and stockholders of the debtor are hereby divided into the following classes according to the nature of their respective claims and interests; (reference being made to said petition of the debtor filed herein verified August 20, 1935, for a more detailed description thereof), to wit, the respective holders of the following claims and interests, each of the following numbered paragraphs constituting a separate class:

1. First Mortgage 5% Bonds.
  2. General and Refunding Mortgage Bonds.
  3. The debtor's secured promissory notes to A. C. James Co.
  4. The debtor's secured promissory notes to Reconstruction Finance Corporation.
  5. The debtor's secured promissory notes to The Railroad Credit Corporation.
  6. Equipment obligations to Baldwin Locomotive Works (Assigned to Fidelity-Philadelphia Trust Co., Trustee.).
  7. Equipment Trust Certificates under agreement dated March 1, 1923.
  8. Equipment Trust Certificates under agreement dated March 15, 1924.
  9. Equipment Trust Certificates under agreement dated May 1, 1929.
  10. The debtor's obligation as to advances made on open account by The Western Pacific Railroad Corporation.
  11. The debtor's obligation as to advances made on open account by The Western Realty Company.
  12. The debtor's Preferred Capital Stock.
  13. The debtor's Common Stock.
  14. All other claims, obligations and liabilities not hereinabove specifically described.
- Fifth. None of the foregoing claims or obligations is affected by the Plan of Reorganization herein except:
- (a) First Mortgage 5% Bonds.
  - (b) General and Refunding Mortgage Bonds.

(c) The debtor's secured promissory notes to A. C. James Co.

(d) The debtor's secured promissory notes to Reconstruction Finance Corporation.

(e) The debtor's secured promissory notes to The Railroad Credit Corporation.

(f) The debtor's obligation as to advances made on open account by The Western Pacific Railroad Corporation.

(g) The debtor's obligation as to advances made on open account by The Western Realty Company.

(h) The debtor's Preferred Capital Stock.

(i) The debtor's Common Stock.

Sixth. The debtor shall give notice accordingly by mailing, at their respective addresses as shown by the records of the debtor, a copy of this order to each of the corporate trustees under the indentures or agreements securing the above-mentioned mortgage bonds and equipment obligations, to A. C. James Co., to Reconstruction Finance Corporation, to The Railroad Credit Corporation, to The Western Pacific Railroad Corporation, to the Western Realty Company, and by publication of a brief summary of this order in a newspaper published in the City of San Francisco and in a newspaper published in the City of New York. Such mailing and publication shall be made prior to September 1, 1935, unless the time be extended by further order of the Court herein, and thereafter proof of such mailing and publication shall be filed herein, but the failure of any creditor to receive any such notice shall not, unless the Court in its discretion

shall otherwise determine, constitute cause for extending the time within which any such creditor may comply with the provisions of this order.

Seventh. The foregoing division of creditors and stockholders into classes is without prejudice to the rights of any such creditors and stockholders and of the debtor in any litigation or controversy, in respect of the claims and interests represented thereby, in the event the Plan of Reorganization proposed by the debtor is not confirmed and consummated and such claims and interests disposed of in accordance with such Plan of Reorganization.

This Court reserves full right and jurisdiction to make, from time to time, such further orders (including orders reclassifying the claims or interests of creditors and stockholders) amplifying, extending, limiting or otherwise modifying this order, as to it may at any time seem proper.

Dated: Aug. 20, 1935.

/s/ A. F. St. SURE,  
District Judge.

[Endorsed]: Filed Aug. 20, 1935.

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[Title of District Court and Cause.]

### ORDER APPOINTING TRUSTEES

This cause coming on further to be heard this day pursuant to subdivision (c) of amendatory Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy and to the Order of this Court entered herein August 31, 1935;

And it appearing to the Court that debtor has given notice as directed in said Order entered August 31, 1935, to the mortgage trustees, creditors and stockholders and has caused publication thereof for such period and in such newspapers as said Order directs of a hearing to be held this day at ten o'clock in the forenoon, at which hearing, or any adjournment thereof, the Court shall appoint one or more trustees of debtor's property, as provide in said amendatory Section 77; and the following parties having appeared herein, or communicated to this Court recommendations with respect to the appointment of such trustees:

Crocker First National Bank of San Francisco and Samuel Armstrong, successor trustees, under indenture securing debtor's First Mortgage 5% Bonds;

The Chase National Bank of the City of New York, as trustee under indenture securing debtor's General and Refunding Mortgage Bonds;

A. C. James Co., holder of certain of debtor's secured promissory notes;

Reconstruction Finance Corporation, holder of certain of debtor's secured promissory notes;

The Railroad Credit Corporation, holder of certain of debtor's secured promissory notes;

Fidelity-Philadelphia Trust Co., Trustee of equipment obligations to Baldwin Locomotive Works;

The Chase National Bank of the City of New



York, as Trustee under agreement dated March 1, 1923, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated March 15, 1924, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates;

The Western Pacific Railroad Corporation, holder of debtor's obligation for advances on open account;

The Western Realty Company, holder of debtor's obligation for advances made on open account;

The Western Pacific Railroad Corporation, holder of debtor's Preferred Capital Stock;

The Western Pacific Railroad Corporation, holder of debtor's Common Stock;

And it appearing to the Court that the creditors and stockholders of the debtor represent that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the debtor and should be at minimum cost to the debtor;

And it further appearing to the Court that under the by-laws of the debtor, T. M. Schumacher, as Chairman of the Executive Committee, is invested with general charge and supervision of and over the affairs and business of the debtor, and, subject to the control of the Board of Directors and Executive Committee, is given general supervision and direc-

tion of the debtor's business in all its departments and over all its officers, agents and employes;

And it further appearing to the Court that Charles Elsey, President of the debtor, is its chief operating officer, directing all of its operations as a common carrier, subject only to the supervision and direction of the Chairman of the Executive Committee;

And it further appearing to the Court that the Chairman of the Executive Committee has conducted all negotiations as to the formulation of pending form of reorganization of the debtor with representatives of holders of the First Mortgage Bonds and its junior creditors, all of whom are in the East, including Reconstruction Finance Corporation, which is undertaking to provide up to ten million dollars of new money to be expended in improving the property of the debtor and for working capital;

And it further appearing that Messrs. T. M. Schumacher and Charles Elsey, if appointed trustees of the debtor, to serve with the additional trustee hereinafter mentioned, are willing to serve without compensation other than that which they are now receiving as such executive officers, and to perform all of their duties pertaining to such officers, so that the appointment of the trustees herein will be without cost to the estate of the debtor, except the salary or compensation of the additional trustee hereinafter mentioned;

And it further appearing to the Court that under

the provisions of subdivision (c) of said amendatory Section 77, it is necessary for the Court to appoint an additional trustee, who within one year prior hereto has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith;

It is hereby ordered:

1. That T. M. Schumacher, Chairman of the Executive Committee of the debtor; Charles Elsey, President of the debtor; and Sidney M. Ehrman, who within one year prior to the date of this Order has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith, be and they hereby are appointed trustees of the debtor's property, which appointments, as well as the other provisions of this Order, shall be effective as of the beginning of business on October 1, 1935, upon ratification thereof by the Interstate Commerce Commission, as provided in subdivision (c) of said amendatory Section 77.

2. That said trustees shall have all the title and shall exercise, subject to the control of this Court and consistent with the provisions of said amendatory Section 77, all of the powers of trustees appointed pursuant to Section 44 of said Act; and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in equity proceeding; and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission, as provided by the Interstate Com-



merce Act as now or hereafter amended, the power to operate the business of the debtor, which business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and employees, but under and subject to the direction of said trustees.

3. That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor pursuant to the Order of this Court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, with respect to the said trustees and the property of the debtor, be of like force and effect as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this Order by reference.

4. That within five days from and after October 1, 1935, each of said trustees shall execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of twenty five thousand dollars, conditioned to the effect that they will well and truly perform the duties of their office and duly account for any moneys or properties which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

5. That this Court reserves full right and juris-

diction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this Order, and in all respects to regulate and control the conduct of said trustees.

Dated: September 23, 1935.

/s/ A. F. St. SURE,  
District Judge.

[Endorsed]: Filed Sept. 23, 1935.

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### ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June A. D. 1939.

Finance Docket No. 10913

### WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

It appearing, That this Commission, by its report and order of October 10, 1938, approved a plan of reorganization for the debtor; and

It further appearing, That upon the filing of petitions by the debtor and five other interveners, requesting that certain modifications be made in the approved plan, the proceeding was reopened and oral argument was heard on the question of such proposed modifications; and

It further appearing, That the Commission upon reconsideration of the record herein in the light of

the aforesaid argument, has, on the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon with respect to the modifications of plan requested, and a full statement of the reasons therefor, which report is hereby referred to and made a part hereof:

It is hereby ordered, That the following plan of reorganization of the aforesaid debtor be, and it is hereby, approved:

Terms used herein shall have the following meanings respectively:

The debtor—The Western Pacific Railroad Company;

Consummation of the plan—The transfer to the reorganized company, to the extent contemplated by the plan, of the properties and assets of the debtor.

Court.—The District Court of the United States for the Northern District of California, Southern Division.

Effective date of the plan.—The date from which interest shall run on the new securities provided in the plan, namely, January 1, 1939.

First-Mortgage bonds.—Bonds issued under the first mortgage dated June 26, 1916, from the company to the First Federal Trust Company and Henry E. Cooper, as trustees (Crocker First National Bank and Samuel Armstrong successor trustees), designated as the first mortgage.

General and refunding bonds.—Bonds issued under the mortgage dated January 1, 1932, from the company to the Chase National Bank of the City of New York as trustee (Irving Trust Company

now successor trustee), designated as the general and refunding mortgage.

Reorganized company.—The corporation, whether the debtor or a new corporation, which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan.

A. The effective date of said plan shall be January 1, 1939.

B. The capitalization of the reorganized company, upon consummation of the plan, shall consist substantially of undisturbed equipment trusts, Baldwin lease, and Pullman contract, \$2,750,050; new first-mortgage 4-percent bonds \$10,000,000; new income-mortgage 4½-percent bonds \$21,219,075; new 5-percent preferred stock \$31,850,297; new common stock without par value 319,441 shares.

C. The first-mortgage bonds shall be secured by a first mortgage, which will be a lien, directly or through pledge of securities, subject only to liens upon equipment, on all the properties and assets owned by the reorganized company on the consummation of the plan, including securities, equipment, and the equity in such equipment as is subject to equipment obligations. The first mortgage will also be a lien on all similar property acquired by the reorganized company after the reorganization, except that (a) if the reorganized company shall acquire the properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939) constituting a class I carrier as defined by the rules of this Commis-

sion or other public regulatory bodies having jurisdiction at the time, such properties shall not be subject to the lien of the first mortgage unless acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds, or moneys deposited under the first mortgage or the income mortgage, and (b) if the reorganized company shall be consolidated with, or shall be merged into, or shall sell its assets substantially as an entirety to, any other company which at the time is a class I carrier defined as aforesaid, no properties theretofore owned or thereafter acquired by such other company shall be subject to the lien of the first mortgage except properties thereafter acquired which shall be appurtenant or incident to properties subject to the lien of the first mortgage, or which shall be within the maintenance or replacement covenants of the first mortgage, or which shall be acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds or moneys deposited under the first mortgage or the income mortgage.

D. The amount of bonds issuable under the first mortgage will be limited to \$50,000,000.

The first mortgage will provide (1) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding shall equal or exceed \$20,000,000, the reorganized company will pay to the trustee under the first mortgage as a sinking fund a sum equal to one-half of 1 per cent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and un-



canceled; and (2) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding plus all other funded debt bearing fixed interest shall exceed either (a) 35 percent of the total capitalization of the reorganized company, determined as hereinafter provided, or (b) 50 percent of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the reorganized company, in addition to the sums provided in this subdivision D to be paid, will pay into said sinking fund a sum equal to 50 percent of the available net income of the next preceding calendar years that remains after providing for all income mortgage sinking funds and charges prior thereto (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2), (3), (4), and (5) of the fourth paragraph of subdivision L hereof; or after the provisions of said subdivision L shall have ceased to be operative, 50 percent of net income as defined by the accounting rules or practice referred to in said subdivision L). Such sinking fund shall be applied to the retirement of first-mortgage bonds, by purchase in the open market or by call for tenders at not exceeding the redemption price (or in the case of bonds not redeemable, the principal amount and accrued interest), and whenever the amount in the sinking fund exceeds \$50,000 and first-mortgage bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of new first-mortgage

bonds on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds. First-mortgage bonds and income-mortgage bonds outstanding shall be deemed to include all bonds authenticated and delivered to the reorganized company which shall not have been canceled or assured of retirement through the deposit of cash. Funded debt shall include an amount equal to the capitalized value, at 5 percent per annum, of fixed rents payable for leased roads, other than terminal or bridge properties, but shall not include (a) obligations, other than mortgage bonds or equipment-trust obligations, maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge of bonds having a lien on property of the reorganized company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the reorganized company as to interest or principal or both, other than bonds of a terminal or bridge company, shall be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the reorganized company's basic proportion of the principal liability. There shall be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without par value, at \$100 a share in case of the stock issuable under the plan, and, in case of other stock, at the capital value at

which such stock is carried on the books of the company, not exceeding, however (except to the extent that earned surplus shall have been duly capitalized), the net amount received by the reorganized company on the issue thereof.

E. The first-mortgage bonds may be issued from time to time in different series, subject to the approval of this Commission or the approval of such regulatory body or tribunal as may have jurisdiction thereof, and to such limitations and restrictions as may be specified in the first mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with respect to the lien of the first mortgage all equally secured. So long as any first-mortgage bonds, series A, shall be outstanding no additional first-mortgage bonds shall be issued having a maturity earlier than January 1, 1974.

F. Ten million dollars first-mortgage bonds, series A, are to be authenticated and issued in the reorganization for the purpose of providing the \$10,000,000 of new money required in the reorganization.

The bonds of series A shall be dated January 1, 1939, shall mature January 1, 1974, shall bear interest at the rate of 4 percent per annum, payable



semiannually, and shall be redeemable, in whole or in part, at any time on 30 days' notice, at their principal amount and accrued interest, plus a premium of 3 per cent of their principal amount if redeemed on or before December 31, 1943, 2½ per cent if redeemed thereafter and on or before December 31, 1948, 2 percent if redeemed thereafter and on or before December 31, 1953, 1½ percent if redeemed thereafter and on or before December 31, 1958, 1 percent if redeemed thereafter and on or before December 31, 1963, one-half of 1 percent if redeemed thereafter and on or before December 31, 1968, and without any premium if redeemed on or after January 1, 1969.

G. First-mortgage bonds, in addition to those to be authenticated in the reorganization, may be authenticated from time to time, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof: (a) to refund first-mortgage bonds (excluding bonds issued solely by way of pledge, except as hereinafter provided) or outstanding obligations secured by first-mortgage bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the reorganized company for, not exceeding 75 percent of expenditures made after December 31, 1938, but not more than three years prior to the date of such authentication (including expenditures for the acquisition or construction of new railroad equip-

ment, free from other lien, but not including expenditures for the making of additions and betterments to equipment) which, under the accounting rules of this Commission or other Federal regulatory bodies having jurisdiction in the premises, at the time in force, are properly chargeable to capital account; provided, however, that

(a) Except when bonds are authenticated in respect of new mileage (or securities representative thereof) or in respect of new equipment, the said 75 percent shall be applied to the net amount of said capital expenditures after deducting therefrom, to such extent and on such basis as may be specified in the first mortgage, credits to capital account after December 31, 1938;

(b) If any first-mortgage bonds are authenticated or cash deposited under the first mortgage is withdrawn to provide or reimburse for the acquisition of railroad equipment, a sinking fund shall be established (in addition to any other sinking fund then in effect for any series of first-mortgage bonds) payable in equal annual installments in an amount sufficient to retire (at par) within the expected efficient service life of such equipment (in no case to exceed 15 years) a principal amount of first-mortgage bonds equal to (1) the principal amount of bonds so authenticated or (2) the amount of deposited cash so paid;

(c) If any property is acquired subject to existing liens the amount of additional first-mortgage bonds issuable therefor or issued to refund prior-lien obligations thereon, together with the aggre-

gate amount of existing liens to which such property is subject, shall not exceed 75 percent of the net cost thereof, including as part of such cost the amount of such existing liens whether or not the indebtedness secured thereby is assumed by the reorganized company; and

(d) No bonds shall be issued on the basis of the acquisition of equipment under equipment-trust obligations or any obligations for the deferred or serial payment of the purchase price for equipment, or on the basis of the retirement of any such obligations.

H. The first mortgage will contain a covenant substantially to the effect that no first-mortgage bonds (other than those to be authenticated under the plan) will be sold or pledged unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of income-mortgage bonds having a maturity of 20 years or more at a price which would give a yield to maturity of 5 percent or less, or (b) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (c) by the sale of common stock at a price (not less than \$50 a share) which would give a current dividend return (based on the regular

dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6 percent or less.

The first mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all first-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all first-mortgage bonds then authenticated and uncanceled.

I. The income mortgage shall constitute a lien, subject to the lien of the first-mortgage, upon all property from time to time subject to the lien of the first mortgage.

The income-mortgage bonds may be issued, without limit as to aggregate amount or within such limit as may be specified in the income mortgage, from time to time in different series, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof, and subject to such limitations and restrictions as may be specified in the income mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds, and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with

respect to the lien of the income mortgage all equally secured. No interest shall be mandatorily payable on income-mortgage bonds of any series (except at maturity or redemption) except out of available net income, as hereinafter provided.

J. Twenty-one million two hundred nineteen thousand seventy-five dollars of income-mortgage bonds, series A, are to be authenticated and issued in the reorganization, as set out in subdivision P below.

The income-mortgage bonds of series A shall be dated January 1, 1939, shall mature January 1, 2014, shall bear interest at the rate of  $4\frac{1}{2}$  per cent per annum, due and payable as hereinafter provided, and shall be redeemable, in whole or in part, on May 1 in any year, on 30 days' notice, at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of  $4\frac{1}{2}$  percent per annum from the last preceding December 31 to the redemption date.

The income-mortgage bonds of series A shall be convertible into shares of common stock, as at the time constituted, at any time at the rate of 20 shares per \$1,000, principal amount, of such bonds.

Interest on income-mortgage bonds, series A, accruing for each calendar year shall (up to the limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but shall be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest shall be mandatorily payable (except as hereinafter



provided) only out of available net income of the reorganized company that remains after providing for the capital fund and charges prior thereto (i.e., that remains after the deductions made pursuant to subparagraphs (1) and (2) of the fourth paragraph of subdivision L). All interest that comes due and is not paid on the next following May 1 shall accumulate up to the maximum amount of 13½ per cent at any one time, but not beyond. Accumulated interest shall be mandatorily payable (a) whenever, and to the extent that, there is available net income for any subsequent year remaining after the deductions made pursuant to said subparagraphs (1) and (2) of the fourth paragraph of subdivision L (in which case such amount shall be paid on the next following May 1), or (b) in any event (whether earned or not) at the maturity or on redemption of the income-mortgage bonds of series A. For the purposes of the two sentences next hereinabove, payment of interest shall be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The board of directors of the reorganized company may at any time, in its discretion, pay any interest accrued on the income-mortgage bonds, series A, even if not earned, out of any funds lawfully available therefor.

The income mortgage will provide for the payment on May 1 of each year while any income-mortgage bonds, series A, are outstanding, of an installment of the sinking fund, if earned, as, and in the amount, hereinafter specified. Such installment



shall be payable only out of available net income for the last preceding calendar year that remains after paying interest on outstanding income-mortgage bonds (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2) and (3) of the fourth paragraph of said subdivision L). The amount of such installment shall equal (a) one-half of 1 percent of the maximum principal amount of income-mortgage bonds, series A, theretofore at any one time authenticated and uncanceled, plus (b) an amount equal to interest on all income-mortgage bonds, series A, theretofore purchased or redeemed out of the sinking fund, calculated at the rate paid on said May 1 upon outstanding income-mortgage bonds of series A. Such accruals of the sinking-fund installments shall not be cumulative. The sinking fund shall be applied from time to time to the retirement of income-mortgage bonds, series A, by purchase in the open market or by call for tenders at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds \$50,000 and income-mortgage bonds, series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of the income-mortgage bonds, series A, on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds.

Income-mortgage bonds, in addition to those to be issued in the reorganization, may be issued from

time to time, subject to the approval of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof, to refund outstanding income-mortgage bonds or in lieu of first-mortgage bonds, for the purposes and subject to the restrictions stated in respect of the issue of additional first-mortgage bonds above, to the extent that first-mortgage bonds are not issued for such purposes.

K. No income-mortgage bonds (other than those to be issued under the plan) may be authenticated and delivered unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (b) by the sale of common stock at a price (not less than \$50 a share) which would give a current dividend return based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last 12 calendar months) of 6 percent or less.

The income mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all income-mortgage

bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all income-mortgage bonds then authenticated and uncanceled.

The income mortgage will provide, within conditions and limits to be therein prescribed, for the modification and alteration thereof and of the rights and obligations of the reorganized company and of the holders of the income-mortgage bonds thereunder, at any time by the concurrent action of the reorganized company and of the holders of not less than  $66\frac{2}{3}$  percent in aggregate principal amount of the bonds then outstanding; provided, however, that no such change or modification shall alter or impair the obligation of the reorganized company to pay the principal of any bond without the consent of the holder of such bond. In the event of any unification of the properties of the reorganized company with the properties of any other company, the modifications hereinabove authorized may include provisions excluding in whole or in part the earnings from such other properties in determining available net income and providing for the determination of such available net income without the maintenance of separate accounts.

L. Available net income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any income-mortgage bonds remain outstanding. When no income-mortgage bonds remain outstanding, the pro-

visions of this subdivision L shall cease to be operative.

Available net income for each such calendar year shall be determined by deducting all fixed charges of the reorganized company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the reorganized company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with the accounting rules of this Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice); provided, however, that if the reorganized company shall not come into ownership and possession of the properties now operated by the bankruptcy trustees on or before January 1, 1939, available net income for any period after January 1, 1939, until the reorganized company comes into ownership and possession of such properties shall be computed as if the reorganized company had come into such ownership and possession on January 1, 1939, and had issued, as of that date, the new securities issuable under the plan, other than the \$10,000,000 of new first-mortgage bonds, series A, and in lieu of interest on such bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding trustees' certificates or other obligations issued to provide funds for rehabilitation purposes.

Available net income shall be ascertained for each such calendar year, as the accounts shall be stated on the books of the reorganized company during such calendar year, without adjustments, except that (1) in determining available net income there shall not be deducted any amounts from the proceeds of the trustees' certificates issued for rehabilitation purposes, notwithstanding that under the accounting rules hereinbefore mentioned such expenditures may be chargeable as operating expenses; (2) if in respect of any calendar year the available net income is a deficit, the amount of such deficit may, in the discretion of the board of directors of the reorganized company, be carried forward and be deducted in determining available net income for the succeeding calendar year or calendar years until such deficit (or accumulated or remaining deficits) be extinguished by earnings which in the absence of such deficit or deficits, would be available net income; and (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far, but only insofar, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available net income for each calendar year shall be applied to the following purposes and in the following order:

(1) to the creation, if and when the aggregate principal amount of first-mortgage bonds outstand-



ing shall equal or exceed \$20,000,000, of the sinking fund provided for in subdivision D hereinabove, in an amount up to, but not exceeding, in respect of any calendar year, one-half of 1 percent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and uncanceled.

(2) To the creation of a capital fund to be applied to, or to provide for, or to reimburse the treasury of the reorganized company for, capital investments, as defined by this Commission's Classification of Income, Profit and Loss, and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701, Investment in road and equipment, 702 Improvements on leased railway property, and 705, Miscellaneous physical property (or advances to subsidiaries for expenditures which, if made directly by the reorganized company in respect of its owned or leased properties, would be charged to said accounts), or such substituted accounts as may at the time be in effect, to the extent that such capital investments have been made or contracted for during such calendar year or within three months thereafter, and including therein (but only to the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or purchased under conditional-sale agreements and installments of sinking fund provided for by subparagraph (b) of subdivision G



(relating to first-mortgage bonds issued for equipment), provided, however, that

(a) The amount set aside in the capital fund each calendar year shall be \$500,000 less amounts charged during the calendar year to operating expenses in respect of retirements of road property, and in respect of depreciation of road property if reserves for depreciation of road property be established, provided that the amount in the capital fund at the end of the calendar year, including the amount set aside for the fund in respect of that calendar year, shall not exceed \$1,000,000.

(b) The capital fund may be applied only to such part of the cost of capital investments as hereinabove defined as remains after deducting from such cost the amounts charged to operating expenses for retirement of road property and all amounts charged to operating expenses for any reserves for depreciation of road property that may be established.

(c) To the extent that expenditures are so provided for or reimbursed out of the capital fund, the company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the preferred stock of series A to capitalize or reimburse such expenditures; provided, however, that such expenditures (if for purposes for which first-mortgage bonds or income-mortgage bonds may be issued) may, within such limits, if any, as may be specified in the first mortgage or the income mort-

gage, be used to supply, in whole or in part, the excess of capital expenditures required to be certified under either such mortgage over the principal amount of the bonds that may be issued under the terms thereof; and

(3) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1, of interest on the then outstanding income-mortgage bonds (not including any thereof then held in any sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon.

(4) Any then remaining available net income for any calendar year shall be applied, so long as any income mortgage bonds, series A, are outstanding, to the payment on the next succeeding May 1, of the sinking fund installment provided for in subdivision J (relating to income-mortgage bonds, series A).

(5) Any then remaining available net income for any calendar year may be applied to the creation of a sinking fund for income-mortgage bonds of series other than series A, if any such sinking fund shall have been provided for at the time of the creation of any such series.

(6) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1 of the installment, if any, then due under the sinking fund provisions of subdivision D hereinabove (relating to

first-mortgage bonds when outstanding in excess of certain limits).

(7) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company (except dividends on the new common stock), including, if and to the extent that such dividends shall be declared by the board of directors of the reorganized company, the payment of dividends upon the preferred stock in respect of such year and of any accrued and unpaid cumulative dividends on the preferred stock; such dividends to be paid, except as hereinafter provided, on such date or dates in the next succeeding year as may be specified in the certificate of incorporation or by-laws of the reorganized company, or in the certificates for the preferred stock.

(8) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company, including (but only after all accrued and unpaid cumulative dividends on the preferred stock to the end of such year shall have been paid, or declared and set apart for payment) dividends on the common stock.

No interest need be paid on income-mortgage bonds if the amount to be paid is less than one-fourth of 1 percent. Any excess available for interest but not paid because of the foregoing provision shall be reserved and added to the income available for interest on the income-mortgage bonds for the next succeeding calendar year.

If there are outstanding income-mortgage bonds of different series, the amount applicable to interest on such bonds shall be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

Dividends may be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the board of directors shall have determined that the available net income for such year applicable for the purposes specified in the foregoing paragraphs (1), (2), (3), (4), (5), and (6) will be more than sufficient to pay the amounts payable out of such available net income pursuant to said paragraphs and such amounts shall have been deposited in trust for the purposes specified in said paragraphs. Dividends on common stock may be so declared only if, prior to such declaration, the board of directors shall have determined that the applicable part of available net income for such year will be more than sufficient to pay the amount hereinabove specified for dividends (including accumulations) on the preferred stock and such amount shall have been deposited in trust for the purpose of paying such dividends.

M. There will be authorized 750,000 shares of preferred stock, each of the par value of \$100, of which 318,502  $\frac{97}{100}$  shares of series A are to be

issued in the reorganization as set out in subdivision P below.

The additional authorized preferred stock not issued in the reorganization will be issuable from time to time, subject to the approval of this Commission, or of such regulatory body or tribunal as may have jurisdiction thereof, in the discretion of the board of directors of the reorganized company, but (unless for purposes for which first-mortgage bonds might otherwise have been issued) only after the concurring vote or consent of the holders of a majority of the outstanding preferred stock. So far as permitted by law, such additional preferred stock may be of series A, or of any other series, one or more, and preferred stock of any such other series may bear dividends at such rate, cumulative noncumulative, may be redeemable or nonredeemable, convertible or nonconvertible, and may have such other rights and privileges and be subject to such limitations and restrictions, as may be from time to time determined by the board of directors prior to the issue of preferred stock of any such other series. If there are outstanding shares of preferred stock of different series, the earnings applicable to dividends thereon shall be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively.

In any liquidation or winding up of the reorganized company, whether voluntary or involuntary, the preferred stock shall be entitled to receive, out of the assets of the reorganized company, its



par value, plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution shall be made on the common stock, but shall not be entitled to any further participation in such assets.

The reorganized company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new preferred stock, (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage, the new income mortgage, or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes, or other evidences of indebtedness maturing more than two years from their date, except new first-mortgage bonds and new income-mortgage bonds and except purchase money obligations given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new preferred stock, or (4) permit any subsidiary, all of the stock of which, except directors' shares, shall be owned by the reorganized company, to create any mortgage or other lien upon any of its properties or issue any bonds, notes, or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mort-



gage or other lien or such other obligations or such stock shall be acquired by the reorganized company.

The preferred stock, series A, shall be entitled to receive all accumulated unpaid dividends and current dividends at the rate of 5 percent per annum in respect of any calendar year before any dividends shall be paid or declared or set apart for payment on the common stock in respect of such year. Such dividends shall be cumulative to the extent earned in any calendar year but not paid; but such dividends shall otherwise be noncumulative. For the purposes of the next preceding sentence hereinabove, preferred stock dividends shall be considered to be earned in any calendar year to the extent covered by the available net income for such year that remains after providing for prior charges (i.e., that remains after the deductions made pursuant to sub-paragraphs (1), (2), (3), (4), (5), and (6) of the fourth paragraph of subdivision L); or after the provisions of said subdivision L shall have ceased to be operative, to the extent covered by net income as defined by the accounting rules or practice referred to in said subdivision L).

After dividends shall have been paid or declared, or set apart for payment, on the new common stock at the rate of \$3 a share in respect of any year, each share of preferred stock, series A, shall be entitled to share equally with each share of new common stock in any dividends paid or declared or set apart for payment, in respect of such year.

The preferred stock, series A, shall be redeem-

able, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year.

The holders of preferred stock, series A, shall not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class.

Holders of preferred stock shall be entitled to one vote per share on all matters, except that in elections of directors, which shall be by cumulative voting each holder of stock of either class shall be entitled to as many votes per share as the number of directors to be elected.

N. There will be authorized 1,000,000 shares of common stock, without par value, of which 319,441 shares are to be issued in the reorganization as set forth in subdivision P below and 424,382 shares shall be reserved for the conversion of income-mortgage bonds, series A. No new common stock additional to that actually issued in connection with the reorganization, as above stated, shall be issued without the further authorization of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof.

Holders of common stock shall be entitled to one vote per share on all matters except that directors shall be elected by cumulative voting as aforesaid.

So far as permitted by law, any vote or consent by the holders of common stock, authorizing the issue of additional shares of stock of any class or of securities convertible into stock of any class,

may waive on such terms and conditions, if any, as may be specified in such vote or consent, the preemptive right of all the holders of shares of common stock to subscribe to such additional shares or securities.

O. The \$10,000,000 of new first-mortgage bonds, series A, to be authenticated and issued in the reorganization shall be sold at par and accrued interest to the Reconstruction Finance Corporation (subject to the approval and authorization of this Commission and the delivery to the Reconstruction Finance Corporation of a legal opinion satisfactory to it as to the validity of the acquisition by the reorganized company of title to the properties of the debtor and the validity of the new first-mortgage bonds, series A, and the new first mortgage). In consideration of such purchase by the Reconstruction Finance Corporation of new first-mortgage bonds, series A, and considering the value of the collateral securing its claim, such claim amounting as of January 1, 1939, to \$3,862,870 (\$2,963,000 principal and \$899,970 interest) and represented by notes secured by general and refunding bonds of the debtor and other collateral, shall be provided for under the plan in like securities and in like proportions as those given holders of the debtor's first-mortgage bonds.

P. The existing securities of the debtor shall be treated as follows:

1. Existing equipment trusts, Baldwin lease, and Pullman contract, aggregating \$2,750,050 shall re-

main undisturbed and shall be assumed by the reorganized company.

2. Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66 $\frac{2}{3}$  of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of income-mortgage 4 $\frac{1}{2}$ -percent bonds, series A (being 40 percent of the principal amount of said existing bonds); \$600 of 5-percent preferred stock, series A (being 60 percent of the principal amount of said bonds); and 4.67 shares of common stock (being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest).

3. The Reconstruction Finance Corporation shall receive in respect of the \$10,000,000 of new money provided for in subdivision O (or the surrender of trustees' certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of \$2,963,000, together with \$899,870 of interest accrued and unpaid thereon to January 1, 1939, approximately \$10,000,000 of new first-mortgage 4-percent bonds, series A (being 100 percent of said new money); \$1,185,200 of income-mortgage 4 $\frac{1}{2}$ -percent bonds, series A (being 40 percent of the principal of said claim); \$1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest).

4. The Railroad Credit Corporation shall receive

in respect of its claim in the principal amount of \$2,445,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company of its subsidiaries under the marshaling and distributing plan, 1931), approximately \$154,111 of income mortgage 4½-percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock (being common stock taken at the price of \$62 per share). The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.

5. The A. C. James Company shall receive in respect of its claim in the principal amount of \$4,999,800, together with \$1,249,950 of interest accrued and unpaid thereon to January 1, 1939, \$163,724 of income mortgage 4½-percent bonds, series A; \$256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock (being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation for its claim).

6. The unsecured claims of the Western Pacific



Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims.

7. The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan.

Q. Claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan. Obligations under the debtor's equipment-trust certificates, the Baldwin lease, and the Pullman contract are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of



the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding.

R. The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled.

Existing mortgages on the debtor's properties shall be released and canceled, and all funds on deposit with the trustees under the debtor's mortgages representing sums paid from time to time to such trustees for the release of properties, sale of scrap, and other wise, and all collateral pledged under the debtor's mortgages, shall be surrendered to the reorganized company free from liens of the debtor's mortgages, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of such mortgages and consistent with this plan. All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledges thereof, and shall be by them surrendered to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan shall become the property of

and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. The court by orders of March 11, 1936, and March 20, 1936, authorized the Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor all outstanding first-mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment. Any such coupons as shall not have been presented for payment up to the time of the consummation of the plan shall be paid in cash by the new company if and when presented by the holders thereof.

The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation, and one by the Railroad Credit Corporation and the A. C. James Company jointly. Should the bondholders committee, or the Reconstruction Finance Corporation, or the Railroad Credit Corporation and the A. C. James Company jointly, fail to designate a representative for membership on the committee within such time as the court shall consider reasonable, the court shall appoint such a representative.

The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.

The method of carrying out the plan shall be determined by the reorganization committee in its discretion, and the reorganization committee shall also determine, subject to the approval of the court, the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the reorganization committee necessary or desirable in connection with carrying out the plan.

The reorganization committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The reorganization committee may employ such agents, attorneys, and others as it may deem desirable for the purposes of the plan. The reorganization committee may from time to time delegate to others any power or discretion conferred upon it by the plan; and the members of the reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by the reorganization committee in good faith, except for their respective individual malfeasance or wilful neglect.

Should the reorganization committee solicit deposits of securities, or authorization to represent

holders of the debtor's existing security in the reorganization, the terms and conditions upon which such solicitation and representation would be made shall be subject to the prior approval of this Commission.

S. If deemed desirable and so ordered by the Court, the plan, after it has been found fair and equitable and confirmed by the court, may be executed by a sale at not less than a fair upset price to be fixed by the court, of all or any part of the property of the debtor, all on such conditions and in such manner as the court may direct. Upon any such sale the property and assets offered for sale may be purchased for the benefit of the reorganized company by the reorganization committee, and in that event there shall be applied on account of the purchase price the distributive share of the proceeds of such sale of all securities the holders of which shall have assented to the plan, and of the securities, though not assenting to the plan, of all classes which shall have accepted the plan.

In the event of a sale of the properties of the debtor to the reorganization committee, the committee may in its discretion sell all or any portion of the new securities, if any, distributable under the plan to holders of existing securities, if neither such security holder nor the class to which such security holder belongs shall have accepted the plan, provided that security holders in a class which shall not have accepted the plan, and who themselves shall not have accepted the plan shall have the right, if they shall so notify the committee within a period of 30 days after the confirmation



of such sale, to assent to the plan and receive the securities allocated to them under the plan in lieu of their aliquot share of the proceeds of such sale of the properties. The proceeds of any such sale of securities may be used to pay the portion of the purchase price payable in cash on any such sale of the properties.

T. Unless otherwise provided in section 77 or any order or orders of the court in the reorganization proceeding or of this Commission, whenever notice shall be required or permitted to be given under or pursuant to the plan, such notice shall be given by publishing a copy of such notice once in each week on any secular day in each such week for two successive weeks in one newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the plan, by mailing such notice, postage prepaid, to such security holders whose names and addresses appear on the books of the debtor or of the reorganized company, as the case may be, but failure to mail any such notices, or delay in mailing any such notices, shall not invalidate the notice by publication above provided for, which alone shall be sufficient.

U. The board of directors of the reorganized



company shall consist of not less than 7 nor more than 11 members, who shall be elected by the holders of the preferred stock and the common stock of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors shall consist of such persons as may be designated by the reorganization committee, with the approval of the court.

V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.

W. Acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and this Commission, to the same effect as though the terms of such instruments were set out in full herein.

Notwithstanding any other provisions of this modified order, the reorganized company shall assume the liability for, and shall pay in full in due course, any and all taxes due to the United States from the debtor or the debtor's trustee for any taxable period prior to the date of the confirmation of the plan, whether or not proof thereof has been made in the proceeding and without prejudice by reason of not having made proof thereof.

It is further ordered, that the authorization and

approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustments under the order will be submitted to this Commission for approval before they are recorded on the books of the reorganized company under the plan of reorganization herein approved;

It is further ordered, that nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale consolidation, or merger of the debtor's properties, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, except as provided herein, or until further action by this Commission upon confirmation of the plan by the court; and

It is further ordered, that the order herein, dated October 10, 1938, be, and it is hereby, revoked.

By the Commission.

(Seal)

W. P. BARTEL,  
Secretary.

[Endorsed]: Filed July 29, 1939.

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[Title of District Court and Cause.]

## ORDER APPROVING PLAN OF REORGANIZATION FOR DEBTOR

These proceedings come on for hearing on the modified plan of reorganization for the Debtor, approved by the Interstate Commerce Commission in

its Report and Order entered June 21, 1939, and certified to this Court by said Commission on September 28, 1939, together with a transcript of the proceedings before said Commission and a copy of its said Report and Order approving said modified plan, and the Court having considered the entire record in these proceedings, including the transcript of the proceedings before said Commission certified to this Court and the evidence adduced and arguments presented at the hearing before this Court on January 22 to 25, 1940, and the Court having heretofore on August 15, 1940, filed its opinion herein.

The Court Finds:

1. The findings of fact made by the Interstate Commerce Commission in its Original Report on October 10, 1938, as modified by its Supplemental Report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, are adopted as findings by this Court.

2. The Plan of Reorganization, approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939:

(a) Includes provisions modifying and altering the rights of creditors of the Debtor;

(b) Provides for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property, in light of its earnings experience and all other relevant facts, there should be

adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(c) Provides adequate means for the execution of the Plan; and

(d) In all other respects complies with the provisions of Subsection (b) of Section 77.

3. Said Plan of Reorganization:

(a) Is fair and equitable;

(b) Affords due recognition to the rights of each class of creditors and stockholders;

(c) Does not discriminate unfairly in favor of any class of creditors or stockholders;

(d) Will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and

(e) Provides for payment of all costs of administration and all other allowances made or to be made by this Court.

4. By order entered August 15, 1940, this Court fixed the amount to be paid by the Debtor, or any corporation acquiring its assets, for fees and expenses incident to the reorganization through October 31, 1939. Said amounts are reasonable and within maximum limits heretofore fixed by the Interstate Commerce Commission and said order constitutes full disclosure of the approximate amounts to be paid by the Debtor, or such other corporation, for such fees and expenses so far as they could be ascertained at the date of said hearing before this Court on January 22 to 25, 1940. Such additional amount as may be required to be paid by the Debtor or such other corporation for services performed and expenses incurred (including reasonable attorneys'

fees) after October 31, 1939, in connection with the proceeding and plan of reorganization, and in connection with the carrying out of said plan, if the same is finally confirmed, cannot be ascertained at this time, but such amounts will be subject to the approval of this Court within maximum limits hereinafter to be fixed by the Interstate Commerce Commission.

5. By order entered August 20, 1935, this Court divided the creditors and stockholders of the Debtor into classes and the classes of creditors hereinafter referred to are those fixed by said order.

Wherefore, It Is Ordered:

First: The objections to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment heretofore filed herein by or on behalf of the Debtor, the Institutional Bondholders Committee, the Trustee under the Debtor's General and Refunding Mortgage, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company are hereby severally overruled and denied.

Second: Said Plan of Reorganization is hereby in all respects approved.

Third: The findings made by the Interstate Commerce Commission that the interests of the following classes of creditors:

(a) The Debtor's equipment obligations to be assumed by the Reorganization Company, being classes 6, 7, 8 and 9;

(b) Claims against the Debtor entitled to priority over any mortgage of the Debtor, current liabilities and obligations incurred by the Trustees of the



Debtor during this reorganization proceeding, and expenses of reorganization allowed by this Court within the maximum limits fixed by the Interstate Commerce Commission, which shall be paid in cash or assumed by the Reorganized Company, and which are unclassified;

(c) Executory contracts of the Debtor which have been affirmed or have not been disaffirmed by the Trustees of the Debtor and not terminating prior to the conclusion of this reorganization proceeding which are to be assumed by the Reorganized Company and which are unclassified;

(d) Executory contracts made by the Trustees of the Debtor with the approval of this Court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding, which are to be assumed by the Reorganized Company, and which are unclassified; and

(e) All taxes levied, assessed or accrued against the Debtor or its property or against any subsidiary and remaining unpaid at the date of the confirmation of the plan, which are to be assumed and paid by the Reorganized Company with the same relative priority that they now have with respect to other obligations of the Debtor;

will not be adversely and materially affected by said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to any of such classes for acceptance or rejection.

Fourth: The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of unsecured creditors of the Debtor and

the equity of the holders of the Debtor's Preferred Stock and the Debtor's Common Stock have no value, and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor under said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.

Fifth: The only classes of creditors to whom said Plan of Reorganization shall be submitted for acceptance or rejection are:

(a) Class (1)—holders of claims evidenced by The Western Pacific Railroad Company First Mortgage 5% Bonds due March 1, 1946, issued under the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916, and the interest coupons appurtenant thereto;

(b) Class (3)—Debtor's secured promissory notes issued to A. C. James Co., dated March 28, 1932, and May 31, 1932, respectively, bearing interest at the rate of 5% per annum and due March 28, 1935, and May 31, 1935, respectively, together with the accrued and unpaid interest thereon;

(c) Class (4)—Debtor's secured promissory notes to Reconstruction Finance Corporation, dated March 1, 1932, June 29, 1932, August 1, 1932, August 30, 1932, and March 25, 1933, respectively, bearing interest at the rate of 6% per annum, and due March 1, 1935, June 29, 1935, August 1, 1935, August 30, 1935, and March 25, 1936, respectively, together with accrued and unpaid interest thereon;

(d) Class (5)—Debtor's secured promissory notes

to The Railroad Credit Corporation, dated June 29, 1932, and March 25, 1933, respectively, bearing interest at the rate provided for in the Marshalling and Distributing Plan, 1931, of The Railroad Credit Corporation, each note payable on demand, together with accrued and unpaid interest thereon.

Sixth: T. M. Schumacher and Sidney M. Ehrman, Trustees of the Debtor, be, and they are hereby directed to send a certified copy of this Order and a certified copy of the opinion of this Court filed herein on August 15, 1940, to the Interstate Commerce Commission for use in submitting said Plan of Reorganization hereby approved to the holders of said claims and interests found to be entitled to vote thereon.

Dated August 15, 1940.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 15, 1940.

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[Title of District Court and Cause.]

### ORDER CONFIRMING PLAN OF REORGANIZATION

These proceedings coming on for further hearing pursuant to the order of this Court entered herein on September 22, 1943, and upon the notice provided to be given by said order, for the purpose of determining whether or not the plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, shall be confirmed, and this Court having considered the record in these

proceedings and having heard all parties in interest desiring to be heard in support of or in opposition to the confirmation of said plan of reorganization and being fully advised in the premises,

The Court Finds:

1. Due notice of said hearing has been given in accordance with said order of this Court entered herein on September 22, 1943.

2. This Court has jurisdiction of the subject matter of these proceedings and of all of the parties in interest.

3. On July 15, 1943, in conformity with subsection (e) of Section 77 of the Bankruptcy Act, as amended, said plan of reorganization was duly submitted by the Interstate Commerce Commission for acceptance or rejection to the creditors of Classes 1, 3, 4 and 5. In view of the findings of the Interstate Commerce Commission contained in its order dated June 21, 1939, in Finance Docket No. 10913, and the findings of this Court contained in said order entered herein on August 15, 1940, submission of said plan of reorganization to any other class of creditors or to any class of stockholders is not necessary under subsection (e) of Section 77 of the Bankruptcy Act, as amended.

4. On September 15, 1943, the Interstate Commerce Commission duly filed herein its certificate dated September 4, 1943, in which it duly certified to the Judge of this Court the results of said submission.

5. Said plan of reorganization has been duly accepted by or on behalf of creditors of each class to which submission is required under subsection (e)

of Section 77 of the Bankruptcy Act, as amended, holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan of reorganization, submission of said plan of reorganization to any class of stockholders not being required under said subsection (e), and such acceptances have not been made or procured by any means forbidden by law.

6. The United States is not a creditor of the Debtor on claims for taxes or customs duties, unless it be on claims for the payment of which said plan of reorganization duly provides.

7. All requirements for the confirmation of said plan of reorganization pursuant to Section 77 of the Bankruptcy Act, as amended, have been duly complied with, and said plan of reorganization should be confirmed.

8. This Court has this day filed herein an opinion containing a statement of the Court's conclusions and reasons for confirming said plan of reorganization.

9. Article R of said plan of reorganization, among other things, provides:

“The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation, and one by the Railroad Credit Corporation and the A. C. James Company jointly.”



In conformity with said Article R, Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson have been duly designated for membership on said reorganization committee, said Frederick H. Ecker having been designated by Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Committee representing a Group of Institutional Holders of the First Mortgage Bonds of the Debtor, said Frank C. Wright having been designated by Reconstruction Finance Corporation, and said Robert E. Coulson having been designated by The Railroad Credit Corporation and A. C. James Co. jointly. This Court is satisfied that said Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson should be approved as members of said reorganization committee.

Wherefore, It Is Ordered:

First: Said plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, is hereby confirmed.

Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in Article R of said plan of reorganization is hereby approved. Said reorganization committee shall have the powers and authority provided for in said plan of reorganization and shall have full power and authority, under and subject to the supervision and control of this Court, to put into effect and carry out said plan of reorganization and the orders of this Court relative thereto, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. This Court hereby reserves

the power, subject to the provisions of Section 77 of the Bankruptcy Act, as amended, and said plan of reorganization, further to define, extend, amend, or otherwise change the powers and duties of said reorganization committee and to enter orders approving or disapproving any action on their part. As provided in Article R of said plan of reorganization, the members of said reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by them in good faith, except for their respective individual malfeasance or willful neglect. To the extent necessary to give effect to the provisions of this paragraph, the members of said reorganization committee shall be indemnified and held harmless against any loss or expense, by the Trustees of the properties of the Debtor until the properties of the Debtor shall have been surrendered by said Trustees and thereafter by the Debtor or such other corporation as may acquire said properties pursuant to said plan of reorganization.

Third: Jurisdiction of these proceedings and of all parties in interest is hereby retained for the purpose of entering such other and further orders as this Court may determine to be necessary.

Fourth: As used in this order, the term "parties in interest" shall include the Debtor, all parties to these proceedings, all indenture trustees, and all creditors and stockholders of the Debtor.

Dated October 11, 1943.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 11, 1943.

[Title of District Court and Cause.]

Order Making an Allowance to be Paid Out of the Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection with the Proceedings and Plan of Reorganization by the Reorganization Committee

The petition filed on September 28, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order making an allowance to be paid out of the debtor's estate for certain expenses incurred and to be incurred in connection with the proceedings and plan of reorganization by the Reorganization Committee, duly came on to be heard and was heard on the 16th day of October, 1944, and has been submitted.

The Court being fully advised in the premises, finds that due and proper notice of the hearing upon said petition in the form prescribed by the order of this Court dated and filed on the 29th day of September, 1944, has been admitted by all parties named in said order and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) That, pursuant to Section 77(c)(12) of the Bankruptcy Act, the Interstate Commerce Commission by its order dated September 7, 1944, has fixed the maximum limit for reasonable and necessary expenses of the Reorganization Committee, other than the fees and expenses of the attorneys for said Committee, in the amount of \$197,111.23, of which

the amount of \$60,638.48 constitutes the maximum limit fixed for the contingent tax liability described in said order and the amount of \$136,472.75 constitutes the maximum limit fixed for all other purposes, without limitation as to individual amounts with respect to component items, as described in said order;

(b) That for the purpose of enabling the Reorganization Committee to perform its proper functions in an orderly and expeditious manner, the procedure for auditing and payment of bills or statements of expenditures, and for the advancement of funds to said Committee, which is set forth in paragraphs 4 and 5 of the petition upon which this order is made, is appropriate and advisable and should be approved.

(c) That certain expenses heretofore incurred by the Reorganization Committee, in the aggregate amount of \$3,144.00, the detail of which was submitted to the Court upon the hearing, were properly incurred and are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred and to be incurred by the Reorganization Committee under the plan of reorganization of The Western Pacific Railroad Company, exclusive of fees and expenses of said Committee's counsel, is hereby made in the aggregate amount of \$197,111.23, or so much thereof as may be required in carrying out the plan, of which the amount of \$60,638.48, or so

much thereof as may be required, is allowed for the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944, and the amount of \$136,472.75, is allowed for all other expenses without limitation as to individual amounts with respect to component items, as described in said order;

2. That the Trustees of the debtor's estate be and hereby are directed to reimburse the Reorganization Committee and its officers and members out of the debtor's estate for certain expenditures heretofore incurred by them, in the aggregate amount of \$3,144.00, the detail of which was submitted to the Court upon the hearing.

3. That further payments of the actual and reasonable expenses of the Reorganization Committee (whether incurred before or after the date of this order) be made out of the debtor's estate by the Trustees thereof, so long as said Trustees are in control of the same, and thereafter by the reorganized company, by the following procedure:

(a) The Reorganization Committee shall approve bills or statements of expenditures by voucher or covering letter, as may be convenient, signed by the Chairman or Secretary of the Committee, and shall submit the same to the Treasurer for the Trustees of the debtor or of the reorganized company, as the case may be;

(b) The Auditor for the Trustees of the debtor or of the reorganized company, as the case may be, shall examine all such bills or statements and, if



satisfied they are in order and that the items covered thereby are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944, shall approve them for payment, subject to the maximum limit of \$136,472.75 contained in said order of said Commission, and said Treasurer shall then make payment of the same upon such approval by said Auditor;

(c) Said Auditor shall keep a separate and detailed account of all such bills and statements so honored and shall make reports thereof to the Court within a reasonable time after the close of each month in which any such bills or statements are honored;

4. That funds for the payment of actual and reasonable expenses of the Reorganiaztion Committee may be advanced to it, from time to time, out of the debtor's estate or by the reorganized company, as aforesaid, upon written request to said Treasurer, setting forth the purpose of such advances and signed by the Chairman or Secretary of said Committee. Said request shall be audited and reported to the Court by said Auditor under the procedure set forth in paragraph (3) of this order. Said Committee shall account to said Auditor, from time to time, for all advances and shall file with him all receipts or other evidences of expenditures paid from such advances, and shall return any unexpended portion thereof to said Treasurer.

5. All such further payments and advances to the Reorganization Committee under the provisions of this order shall be subject to final approval and al-

lowance by this Court, at such time or times and upon such showing as the Court may direct.

Dated October 23, 1944.

/s/ A. F. ST. SURE,  
District Judge.

[Endorsed]: Filed Oct. 23, 1944.

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In the District Court of the United States for  
the Northern District of California,  
Southern Division

No. 26591-S

In the Matter of The Western Pacific Railroad  
Company, Debtor.

Order Directing the Revesting of Properties of the  
Debtor in the Debtor Company, Fixing the Date  
for Consummation of the Plan and Authorizing  
and Directing the Carrying Out of the Plan.

The petition filed November 8, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan, approving forms of deeds and agreements and authorizing and directing the carrying out of the plan of reorganization, came on duly to be heard on November 27, 1944, and was heard and has been submitted.

The Court being fully advised in the premises, finds that notice of the hearing upon said petition

has been given as prescribed by the order of this Court dated and filed November 8, 1944, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) Pursuant to the order of this Court entered September 25, 1944, approving the proposed Certificate of Amendment to the Articles of Incorporation and proposed amended By-Laws for the debtor company, the stockholders and Board of Directors of The Western Pacific Railroad Company have approved and adopted said Certificate of Amendment and said amended By-Laws and have authorized the necessary filing of said Certificate of Amendment; and upon such filing of said Certificate of Amendment, The Western Pacific Railroad Company will be a proper corporate instrumentality for putting into effect and carrying out the plan of reorganization;

(b) The stockholders of The Western Pacific Railroad Company have consented in writing to the execution and delivery of the Indenture relating to the First Mortgage Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein, and have consented in writing to the execution and delivery of the Indenture relating to the General Mortgage Income Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein and have authorized the assumption by said Railroad Company of certain obligations of the debtor company and its estate as contemplated by the plan of reorganization and

have authorized the Board of Directors to issue shares of preferred and common stock, subject to the provisions of said Articles of Incorporation as so amended, and have authorized and directed the Board of Directors to do all other acts and things that may be necessary or appropriate in carrying out and making effective said plan of reorganization;

(c) The Board of Directors of The Western Pacific Railroad Company has approved the form of Indenture relating to the First Mortgage Bonds contemplated by the plan, the form of Indenture relating to the General Mortgage Income Bonds contemplated by the plan, the form of Scrip Agreement relating to the issuance of scrip in respect of fractional General Mortgage 4½% Income Bonds, Series A, shares of Preferred Stock, Series A, and shares of common stock; has approved the bond, scrip and other forms included in said Indentures and Scrip Agreement, and the forms of certificates for shares of Preferred Stock, Series A, and shares of common stock, and determined the manner of executing the same; has approved mortgaging and pledging the properties and franchises of said Railroad Company, as contemplated in the Indentures mentioned above; has authorized and directed the execution and acknowledgment, and delivery, on or before the date fixed by the Court for the consummation of the plan of reorganization, of said Indentures and the necessary filing and recording thereof, the issue on said date of \$10,000,000 aggregate principal amount of First Mortgage 4% Bonds, Series A, \$21,219,000 aggregate principal amount of

General Mortgage 4½% Income Bonds, Series A, 318,502 shares of the authorized Preferred Stock, Series A, not more than 319,032.767 shares of the common stock and the required scrip certificates, and the assumption of obligations by said Railroad Company, all as contemplated by said plan of reorganization and authorized and directed by the orders of the Court herein;

(d) The proposed deed from the debtor's Trustees to The Western Pacific Railroad Company, the proposed deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage dated June 26, 1916, and the proposed deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, executed February 29, 1932, as of January 1, 1932 (annexed to this order as Exhibits "A," "B" and "C," respectively), are in proper form and sufficient when properly executed, acknowledged and delivered, to release, transfer to and revert in said Railroad Company all right, title and interest of the debtor's Trustees and of said Trustees under the debtor's said mortgages, in and to all of the business, assets and property dealt with by the plan of reorganization, free from any title or lien of the debtor's Trustees and said mortgages, are consistent with and conform to the provisions of the plan of reorganization, are necessary and appropriate to the putting into effect and carrying out the plan, and should be approved;



(e) The proposed agreement, attached to this order as "Exhibit D," provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company, pursuant to the plan of reorganization, is consistent with and conforms to the plan of reorganization, and should be approved;

(f) The Interstate Commerce Commission, by its order dated October 24, 1944, in Finance Docket No. 10913, has authorized the revesting in The Western Pacific Railroad Company of the business, assets and property constituting the estate of the debtor and the issue of securities and the assumption of obligations by The Western Pacific Railroad Company to the extent contemplated by the plan of reorganization and by this order; said order of the Commission also approves and authorizes the adjustment or compromise of the claims of the Reconstruction Finance Corporation against the debtor and its estate, pursuant to the applicable provisions of the Reconstruction Finance Corporation Act and said plan; said order of the Commission authorizes the issue of said securities as subject to Section 77(f) of the Bankruptcy Act, Section 20a of the Interstate Commerce Act and the applicable provisions of the Reconstruction Finance Corporation Act; said securities and the issue thereof are specifically exempt from the provisions of the Securities Act of 1933, under the terms of Section 3(a)(6) of said act and subsection (f) of Section 77 of the Bankruptcy Act and are specifically exempt from the provisions of the Trust Indenture Act of 1939,

under the terms of Section 304(a)(4) of said act, and said action by the Commission satisfies the statutory requirements for such issue and no other or further authorization of any other governmental commission, agency or body, federal or state, is necessary or required;

(g) The issuance, transfer and exchange of the securities and the making, delivery and filing of the instruments of transfer or conveyance issued, transferred, exchanged, made, delivered or filed, pursuant to the plan of reorganization, the order of the Commission referred to in subparagraph (f) above, or this order, are to make effective a plan of reorganization confirmed under the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended.

Now, Therefore, it is hereby ordered, adjudged and decreed:

1. The form and provisions of each of the following instruments are hereby approved:

(a) the deed from the debtor's Trustees to The Western Pacific Railroad Company, attached to this order as "Exhibit A";

(b) the deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit B";

(c) the deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee un-

der the debtor's General and Refunding Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit C."

2. The arrangements made by the Reorganization Committee with Guaranty Trust Company of New York for the services of said Company as depositary and exchange agent and the proposed letter of instructions to said Company relating to the deposit and exchange of securities (submitted at the hearing upon said petition and attached to this order as Exhibit "F"), are approved.

3. The Western Pacific Railroad Company is hereby authorized and directed to file or cause to be filed, on or before December 28, 1944, the Certificate of Amendment to its Articles of Incorporation, heretofore approved by order of this Court entered September 25, 1944, with the Secretary of State of California and, in due course, to file copies thereof, as may be required by law, with the Secretaries of State of Nevada and Utah and in the several counties of the States of California, Nevada and Utah in which the railroad and properties of the debtor are located.

4. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed, substantially in the form attached to this order as "Exhibit A" and approved herein, releasing and transferring to The Western Pacific Railroad Company, as of 12:01 A.M., Pacific War

Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, and are further authorized and directed thereafter to execute, acknowledge and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper to release, convey, assign or transfer to said Railroad Company, their entire right, title and interest in and to all of the business, assets and property of said Railroad Company.

5. Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage dated June 26, 1916, executed by the debtor to First Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, successor Trustees), are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 A.M., Pacific War Time, on December 29, 1944, said First Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit B" and approved herein, to transfer, convey and deliver to said Railroad Company, all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interest of every kind and description held by them as Trustees under said Mortgage and instruments



supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

6. Irving Trust Company of New York, as Trustee under the debtor's General and Refunding Mortgage executed February 29, 1932, as of January 1, 1932, by the debtor to The Chase National Bank of the City of New York, Trustee (Irving Trust Company, successor Trustee), is hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 A.M., Pacific War Time, on December 29, 1944, said General and Refunding Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit C" and approved herein, to transfer, convey and deliver to said Railroad Company all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interests of every kind and description held by it as Trustee under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

7. Whether executed before or after the date of consummation of the plan of reorganization, each of the deeds of release and satisfaction made pur-



suant to paragraphs "5" and "6" of this order by the trustees of the mortgages mentioned in said paragraphs, shall be effective as of the date of consummation of said plan and as of that date, each of said trustees shall be discharged and relieved of all obligations, liabilities, responsibilities and duties with respect to the particular mortgage or deed of trust and all indentures supplemental thereto, under which such trustee is acting.

8. The Western Pacific Railroad Company and its proper officers are hereby authorized and directed to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as "Exhibit D," the form and provisions of which are hereby approved;

(b) the Indenture relating to the First Mortgage Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 A.M., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order;

(c) the Indenture relating to the General Mortgage Income Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 A.M., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order, but immediately following and subject to the taking effect of the Indenture referred to in subdivision (b) of this paragraph 8;

(d) The Scrip Agreement referred to in said petition, substantially in the form submitted to this Court upon the hearing on said petition, which Agreement is found to be substantially in the form approved by order of this Court entered October 23, 1944;

(e) the salary agreement substantially in the form attached to this order as "Exhibit E," the form and provisions of which are hereby approved.

9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have

heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission. Without limitation of the generality of the duties imposed on The Western Pacific Railroad Company as above provided, it shall specifically assume and agree to perform the obligations of the Trustees in respect of the following

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western

Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not therefore been presented for payment, being the coupons which this Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States



from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by said Railroad Company of the agreement of assumption referred to in paragraph "8(a)" above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, with-



out limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursed of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pursuant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company

on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided; and The Western Pacific Railroad Company shall, on said date

(a) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to holders of the debtor's existing first mortgage bonds, or upon their order, upon presentation and surrender of such bonds, together with all interest coupons due after September 1, 1933 (upon which surrender said first mortgage bonds and interest coupons shall be cancelled), said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including the authorized scrip for fractional interests), and the adjustment payments heretofore ordered by this Court (for each \$1,000 principal amount of existing first mortgage bonds so surrendered, \$400 principal amount of General Mortgage 4½% Income Bonds, Series A; \$600 face amount of Preferred Stock, Series A, 4.67 shares of common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944);

(b) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to holders of scrip certificates for the debtor's existing first mortgage bonds in the aggregate principal amount of \$300, or upon their order, upon surrender of said certificates in lots of \$100 principal amount or any multiple thereof, said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court upon the same basis as such securities are issuable to holders of the debtor's existing first mortgage bonds, as provided in subparagraph (a), of this paragraph 11.

(c) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to the holder or holders of ten of the debtor's existing first mortgage bonds, namely, Nos. M3595, M3596, M21612, M21613, M21614, M21615, M21616, M21618, M21619 and M21620, or upon their order, upon presentation and surrender of such bonds with coupons maturing on and after September 1, 1935, attached, notwithstanding the provisions of subparagraph (a), of this paragraph 11, only said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said bond, \$400 principal amount of General Mortgage 4½% Income Bonds,

Series A, \$600 par value of Preferred Stock, Series A, 3.356 shares of common stock and the adjustment payments as provided in the order of this Court dated September 25, 1944; and execute, issue and deliver or cause to be made available for delivery through said depository and exchange agent to The Western Pacific Railroad Corporation, or upon its order, in respect of coupons numbered 36 and 37 formerly attached to each of said bonds, upon presentation and surrender of such coupons, said Railroad Company's common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said coupon, .437 shares of common stock and the adjustment payment as provided in the order of this Court dated September 25, 1944.

(d) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to Reconstruction Finance Corporation, \$10,000,000 principal amount of said Railroad Company's First Mortgage 4% Bonds, Series A, bearing interest from January 1, 1945, \$1,185,200 principal amount of its General Mortgage 4½% Income Bonds, Series A, \$1,777,800 par value of its Preferred Stock, Series A, 15,788 shares of its common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944; and Reconstruction Finance Corporation shall, on such date, surrender and pay over to

said Railroad Company, all outstanding Trustees' certificates of indebtedness heretofore at any time issued by the debtor's Trustees to Reconstruction Finance Corporation, \$6,000,000 of cash collateral heretofore deposited with Reconstruction Finance Corporation by the debtor's Trustees as security for said Trustees' certificates, all notes and other evidences of indebtedness of the debtor held by Reconstruction Finance Corporation, all bonds and other obligations of the debtor held by Reconstruction Finance Corporation as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes held by Reconstruction Finance Corporation; and Reconstruction Finance Corporation shall, on such date, pay over to said Railroad Company the further sum of \$1,075,000 in cash, less such sum as may be required for the payment of interest upon said Trustees' certificates to December 29, 1944, and the payment of an amount equal to interest on said \$10,000,000 of First Mortgage 4% Bonds from said date to January 1, 1945;

(e) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to The Railroad Credit Corporation, or upon its order, \$154,080 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, \$241,640 par value of its Preferred Stock, Series A, not more than 35,425 shares of common stock (including the authorized Scrip for fractional



interests) and \$72.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender by The Railroad Credit Corporation of all notes and other evidences of indebtedness of the debtor held by The Railroad Credit Corporation and of all bonds and other obligations of the debtor held by The Railroad Credit Corporation as collateral security for said indebtedness and all other collateral pledged by the debtor as security for the notes held by The Railroad Credit Corporation (other than the pledge of the distributive shares of the Railroad Company and its subsidiaries under the marshalling and distributing plan of 1931); provided, however, that of the maximum amount of common stock so authorized to be issued to The Railroad Credit Corporation, only so much shall be issued as is within the limitation fixed by the order of this Court made September 14, 1944, providing for the reduction of such common stock on account of sums applied by The Railroad Credit Corporation under the marshalling and distributing plan in reduction of its claims, but in the event that said order of September 14, 1944, shall be modified or reversed upon appeal so as to entitle The Railroad Credit Corporation to receive additional common stock within the maximum limit hereinabove stated, then The Western Pacific Railroad Company shall execute, issue and deliver such additional common stock without further order of this Court and without further consideration other than the surrender by The Railroad Credit Corporation at the time of

the consummation of the plan of its secured notes of the debtor and the collateral thereto to the extent and in the manner hereinabove provided;

(f) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to A. C. James Co., or upon its order, \$163,680 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, (including the authorized Scrip for fractional interests) \$256,700 par value of its Preferred Stock, Series A, 37,635 shares of its common stock and \$100.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender of all notes and other evidences of indebtedness of the debtor to A. C. James Co., all bonds and other obligations of the debtor held as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes to A. C. James Co.

12. Notwithstanding the provisions of the foregoing paragraphs "4" and "11" of this order, the debtor's Trustees are authorized and directed to continue their control and operation of the debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, and until such time, to retain possession of so much of the funds and properties of the debtor as may be necessary for the purposes of such control and operation; provided, however, that all right and duty of such

Trustees to possess, control or operate said business and properties shall cease at 12:00 o'clock midnight, on December 31, 1944.

13. Any lien which may attach to the property subjected to the lien of the mortgages to be executed and delivered by The Western Pacific Railroad Company pursuant to subparagraphs (b) and (c) of Paragraph 8 of this order, during the period between the execution and delivery thereof and the completion of the recording of said mortgages, shall be subordinate to the lien of such mortgages, unless any such lien so attaching would be prior to the lien of such mortgages if the same had been recorded; and this Court reserves jurisdiction over the business, assets, franchises and property to be vested in The Western Pacific Railroad Company as provided herein, and of any claims to liens which may be asserted against the same, to the extent necessary to give effect to the provisions of this paragraph.

14. Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, as the Reorganization Committee, are hereby authorized and directed to prepare a notice to the holders of first mortgage bonds and secured notes of the debtor, in such form as the Reorganization Committee shall determine, notifying such creditors that they are entitled to present the obligations of the debtor now held by them to the Guaranty Trust Company of New York, the depository and exchange agent designated by the Court, and to receive, on and after December 29, 1944, for such obligations, the new securities and

adjustment payments to which they are entitled under the plan; said Reorganization Committee shall publish said notice twice a week for two successive weeks prior to December 29, 1944, in one daily newspaper of general circulation in the City of San Francisco, California, and in one daily newspaper of general circulation in the City of New York, New York. Said Reorganization Committee shall also mail a copy of said notice at least ten days prior to December 29, 1944, to each of the first mortgage bondholders and secured creditors of the debtor so far as the post office addresses of such security holders are available to the Reorganization Committee.

15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, garnishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belonging to or in the possession of said Railroad Company on and after the time specified in paragraph "11" hereof, by reason of or growing out of any obligation or obligations heretofore incurred by the debtor or the debtor's Trustees herein.

16. The Reorganization Committee and The Western Pacific Railroad Company shall have full power and authority to and shall put into effect

and carry out the reorganization plan and the orders of this Court, including this order, relative thereto, the laws of any state or the decision or order of any state authority to the contrary notwithstanding.

17. For the purpose of the determination and application of the available net income of the reorganized company for the calendar year 1944, pursuant to subdivision "L" of the plan of reorganization, and for the determination of amounts payable as interest on the General Mortgage 4½% Income Bonds, Series A, of the reorganized company out of available net income for the calendar year 1944, and for the determination of earnings for the calendar year 1944, available for determination and payment by the directors of dividends upon the preferred and common stocks of the reorganized company, the operation by the debtor's Trustees of the properties and estate of the debtor during the calendar year 1944, shall be deemed to be for the account of the reorganized company; and the directors of the reorganized company are expressly authorized and directed to proceed with the determination of the available net income for the calendar year 1944, and the application of such available net income in the same manner as if such operation had actually been carried on in the calendar year 1944 by the reorganized company.

18. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, shall render their final account to this Court on or before May 1, 1945, and The Western Pacific Railroad Company shall pay from time



to time their compensation and expenses, including compensation and disbursements of counsel acting for said trustees, as heretofore fixed by order of this Court until such date.

19. This order and all transactions pursuant hereto shall be without prejudice to any rights or claims of right of Reconstruction Finance Corporation and The Railroad Credit Corporation in and to any collateral pledged by persons other than the debtor as security for the notes of the debtor held by Reconstruction Finance Corporation and The Railroad Credit Corporation respectively, and without prejudice to any right or claim of right of The Railroad Credit Corporation under the terms of the plan of reorganization to retain distribution credits under the marshalling and refunding plan accruing to the debtor and its subsidiaries subsequent to the consummation of the plan of reorganization.

20. This Court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this Court may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this Court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the Reorganization Committee and its attorneys,

or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization.

Dated: Nov. 27, 1944.

/s/ A. F. ST. SURE,  
District Judge.

[Endorsed]: Filed Nov. 27, 1944.

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### EXHIBIT "D"

Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket No. 10913, made a report and order which, among other things, approved and authorized the assumption by said

The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on . . . . ., 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustee of the property of said The Western Pacific Railroad Company, duly appointed in said proceeding (hereinafter called the "Trustees"), have, by deed dated December . . . ., 1944, remised, released, transferred, conveyed and quit-claimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered . . . . ., 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, makes this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not disaffirmed by said Trustees, which remain in effect

on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustee, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability, loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the

covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of the same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M.



Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor:

6. Without limitation of the generality of the

foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 A.M., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this . . . . day of December, 1944.

THE WESTERN PACIFIC  
RAILROAD COMPANY,

By .....  
President

Attest:

.....

[Appropriate acknowledgment to be supplied.]

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[Title of District Court and Cause.]

Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, Approving and Confirming Their Acts and Accounts, Discharging Them as Trustees and Exonerating Their Bonds

The Ninth and Final Report and Accounting by T. M. Schumacher and Sidney M. Ehrman, the

Trustees of the properties of the Debtor above named, and the petition of said Trustees for approval of their acts and accounts, for their discharge as Trustees and for the exoneration of their bonds, filed herein on April 30, 1945, came on regularly for hearing on May 21, 1945, and it appearing and the Court finding:

1. That said Trustees have given notice of hearing by mailing and publication as directed by the order of this Court made on April 30, 1945;

2. That the allegations of said Ninth and Final Report and Accounting and of said petition are true;

3. That as directed by the order of this Court made on November 27, 1944, and as requested by the Reorganization Committee, said Trustees executed, acknowledged and delivered to the Debtor Company, prior to December 28, 1944, a deed substantially in the form attached to said order as Exhibit "A", releasing and transferring to the Debtor Company as of 12:01 a.m., Pacific War Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, thereupon and thereby divesting the Trustees of all title to all properties and assets held by them as Trustees in this proceeding and vesting such title to all thereof in the Debtor Company;

4. That in exchange for said deed, referred to in the immediately preceding paragraph hereof, said Trustees received from the Debtor Company an agreement, substantially in the form of Exhibit "D" attached to said order of November 27, 1944, whereby the Debtor Company assumed and agreed to perform

all contracts, leases, agreements, liabilities and obligations of the Trustees remaining in effect on December 31, 1944;

5. That as authorized and directed by said order of this Court made on November 27, 1944, said Trustees continued their control and operation of the Debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, whereupon all possession, control and operation of said business and properties by the Trustees ceased and terminated, and possession, control and operation of all said business and properties were transferred to and accepted by the Debtor Company;

6. That at or prior to the end of the year 1944 and Trustees divested themselves of, and transferred and conveyed to and vested in the Debtor Company, all title to and all possession, control and operation of the business and properties theretofore held by the Trustees in this proceeding, all as required by orders of this Court; and

7. That all duties, obligations, services and responsibilities of said Trustees in this proceeding have been duly and fully performed and completed, save only the execution of any further instruments of conveyance, transfer, substitution or release which may be requested by the Debtor Company for the purpose of implementing or consummating the complete and effective transfer to the Debtor Company of all of the business, properties, assets, contracts, agreements, leases, actions, rights and claims heretofore held by said Trustees in this proceeding.

Now, Therefore, the Court being fully advised in

the premises, It Is Hereby Ordered, Adjudged and Decreed:

1. That said Ninth and Final Report and Accounting by said Trustees and all of their acts and accounts alleged and set forth in said Ninth and Final Report and Accounting be and the same are hereby approved and confirmed;

2. That said Trustees be, and they hereby are, discharged, reserving, however, to the Trustees, jointly and to each of them separately, and to the survivor of them, the power and authority hereafter to execute and deliver such instruments of conveyance, transfer, substitution or release as may be requested by the Debtor Company from time to time in order to implement, consummate, confirm or further evidence the complete and effective release, transfer and conveyance of the Debtor Company of all the business, properties, assets, contracts, agreements, leases, actions, rights and claims held by the Trustees in this proceeding; provided, however, that said Trustees shall have the right, but shall not be required, to submit any such instruments to this Court for approval prior to execution and delivery thereof, jurisdiction being hereby reserved by the Court for such purposes; and

3. That notwithstanding their discharge said Trustees be, and they hereby are, authorized, jointly and separately, at any time upon the request of the Debtor Company, to cooperate with the Debtor Company in any and every suit, litigation, proceeding, controversy or compromise in which their cooperation as such Trustees may appear necessary or desirable; and



4. That the bonds heretofore given by said Trustees severally for the faithful discharge of their duties and responsibilities be, and the same hereby are, exonerated, and said Trustees and Fidelity and Deposit Company of Maryland, the surety upon each of said bonds, be and they hereby are released from all liability on said bonds.

Dated May 21, 1945.

/s/ A. F. ST. SURE,  
Judge.

[Endorsed]: Filed May 21, 1945.

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[Title of District Court and Cause.]

### FINAL ORDER

The petition filed March 18, 1946 by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above named, for an order approving their expenses, discharging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946 and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.

(b) The plan of reorganization of The Western Pacific Railroad Company, which was duly confirmed by order of this Court dated and entered October 11, 1943, has been fully and properly carried out and put into effect in accordance with the terms and provisions of said plan and the orders of this Court heretofore entered in this proceeding; all acts and things required by the order of this Court dated and entered November 27, 1944, to be done or performed in order to consummate said plan, have been properly done or performed; the exchange of more than 99% of the principal amount of securities of

the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities.

(c) The reasonable and necessary expenses of the Reorganization Committee in carrying out and putting into effect the plan of reorganization, as disclosed by Schedule "B" annexed to the petition for this order, filed by said Committee and supported by evidence introduced at the hearing upon said petition, exclusive of the fees and expenses of the attorneys for said Committee, which have heretofore been approved and allowed by order of this Court filed December 10, 1945, are within the maximum limits approved by the Interstate Commerce Commission and authorized by this Court by order filed October 23, 1944, and should be finally approved and allowed.

(d) Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the duly constituted Reorganization Committee, have fulfilled their functions, faithfully performed their duties as members of the Reorganization Committee and now have no further duties and should be discharged.

(e) The plan of reorganization having been carried out and put into effect in accordance with the terms of the plan and the orders of this Court, a final decree should be entered in this cause, subject only to the reservations of the jurisdiction hereinafter made in this decree.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945.

2. That the expenses incurred by the Reorganization Committee in consummating, carrying out and putting into effect the plan of reorganization, as shown by the summary which is attached as Exhibit "B" to the petition for this order, filed by the Reorganization Committee, are hereby in all respects finally approved and allowed.

3. That the actions of the Reorganization Committee in putting into effect and carrying out the plan of reorganization and the orders and directions of this Court relative thereto, are hereby approved, ratified and confirmed.

4. That Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee herein, be and each of them is hereby discharged and relieved from all further duties herein.

5. That the order of this Court dated and entered November 27, 1944, in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise,

against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting



into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

7. The Western Pacific Railroad Company is hereby ordered and directed to reimburse, indemnify and hold harmless the members of the Reorganization Committee, or any of them, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including, without limitation of the generality of the foregoing, the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944 and allowed in the order of this Court entered October 23, 1944.

8. The Western Pacific Railroad Company is hereby directed to give notice of the entry of this final order by mailing, postage prepaid, a copy of this order to the Trustees of the debtor's estate, the Reorganization Committee, each party of record in the reorganization proceedings before this Court or the Interstate Commerce Commission (or the counsel for each such party), and to cause promptly to be published a notice of the entry of this final order, setting forth in said notice the complete text of this order as certified by the clerk of this Court, such publication to be made once in each of the following: A daily newspaper of general circulation in the City of San Francisco, California; a daily newspaper of general circulation in the City of New York, New York; and a daily newspaper of general circulation in the City of Chicago, Illinois. Proof of such service

and publication shall be filed by said Company with the Clerk of this Court within thirty days after the completion of the same.

9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the debtor's estate, the reorganization proceedings in this Court, entitled in the Matter of the Western Pacific Rail-

road Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated March 28, 1946.

/s/ A. F. ST. SURE,  
District Judge.

Entered in Vol. 37 Judg. and Decrees at page 175.

[Endorsed]: Filed March 28, 1946.

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[Title of District Court and Cause.]

PETITION OF THE WESTERN PACIFIC  
RAILROAD COMPANY FOR AN ORDER  
TO SHOW CAUSE

The petition of The Western Pacific Railroad Company, debtor (now discharged) in the above entitled proceeding, for an order to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of contempt of the Final Order of this Court dated March 28, 1946, respectfully shows:

That the said The Western Pacific Railroad Corporation, a corporation created by and existing under the laws of the State of Delaware, is a party to the above entitled reorganization proceeding.

That in said Final Order this Court expressly found and concluded, among other things, that:

“(a) All of the business, assets and property constituting the debtor’s estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and

Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order."

That in said Final Order this Court ordered, adjudged and decreed, among other things, that:

"6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets

or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

\* \* \* \*

“9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and pro-



visions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.”

That a copy of said Final Order was duly served within 30 days of its date on the said The Western Pacific Railroad Corporation.

That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that the said Final Order has become final and is now in full force and effect.

That on the 24th day of August, 1946, the said The Western Pacific Railroad Corporation commenced in this Court an action numbered 26333-H and entitled: “The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.”

That petitioner was served on the 27th day of August, 1946 with the summons and a copy of the bill of complaint filed in said action. That a copy of said bill of complaint, marked "Exhibit A", is attached hereto and is hereby incorporated herein.

That The Western Pacific Railroad Corporation has asserted in said action a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944. That the commencement of said action is not and has not been provided for or permitted by any order of this Court. That the said action of The Western Pacific Railroad Corporation constitutes a violation of the Final Order of this Court dated March 28, 1946.

Wherefore, the petitioner asks that this Court issue forthwith its order to The Western Pacific Railroad Corporation directing it to show cause why it should not be adjudged guilty of and punished for contempt of the said Final Order of this Court, and for such other and further relief, including its costs and damages, as may be proper in the premises.

/s/ ALLAN P. MATTHEW,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for The Western Pacific Railroad Co.

Of Counsel:

McCutchen, Thomas, Matthew, Griffiths &  
Greene.

(Duly Verified.)

[Endorsed]: Filed Aug. 30, 1946.

EXHIBIT "A"

In the District Court of the United States  
for the Northern District of California,  
Southern Division

The Western Pacific Railroad Corporation,  
Plaintiff,

vs.

Sacramento Northern Railway, The Western Pacific  
Railroad Company and American Trust Com-  
pany of San Francisco, as Trustee under an In-  
denture executed by Sacramento Northern  
Railroad as of July 1, 1918,

Defendants.

BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plain-  
tiff herein, complaining of the above named defend-  
ants, respectfully shows:

I.

That the plaintiff is a domestic corporation created  
by and existing under the laws of the State of  
Delaware.

II.

That each of the defendants is a domestic corpora-  
tion created by and existing under the laws of the  
State of California and is an inhabitant of the  
Northern District of California.

III.

That this is a civil action in equity between citizens  
of different States and that the amount in contro-

versy exclusive of interest and costs exceeds the sum of \$5,000.

#### IV.

That in the year 1928 the plaintiff advanced to the defendant, Sacramento Northern Railway, sums of money aggregating \$877,380, of which \$21,120 was repaid January 31, 1929, leaving a balance due on said date of \$856,260, and in the period subsequent to said advances the defendant, Sacramento Northern Railway, has accrued interest thereon to a total of \$585,130.55, and said amounts aggregating \$1,441,-390.55 are shown as indebtedness due the plaintiff on the General Balance Sheets of the defendant, Sacramento Northern Railway, as of June 30, 1945. That for a number of years within a period of four years next preceding the institution of this suit the defendant, Sacramento Northern Railway, has furnished to the plaintiff duly authenticated Balance Sheets signed by properly authorized accounting officers showing such indebtedness for principal and appropriate amounts for accrued interest thereon as valid and subsisting indebtedness due and owing from said defendant to the plaintiff and has authorized the plaintiff to file each such Balance Sheet on its behalf with Commissioner of Internal Revenue as the basis for the determination of federal taxes.

#### V.

That the aforesaid indebtedness due to the plaintiff by the defendant, Sacramento Northern Railway, in the amount including interest of \$1,441,-390.55 was created and arose in the manner herein-after stated and is entitled in equity to a first and paramount lien on the railways, property and assets

of said defendant, Sacramento Northern Railway, and such indebtedness is entitled to be paid in full prior to any payment of or on account of indebtedness, if any, due and owing to the defendant, The Western Pacific Railroad Company, by the defendant, Sacramento Northern Railway.

## VI.

That the defendant, The Western Pacific Railroad Company, now owns and operates, and at all times mentioned in this Bill of Complaint has owned and operated, a system of Railways in the States of California, Nevada and Utah, with termini at San Francisco, Oakland and Sacramento in the State of California, and Salt Lake City in the State of Utah. That during part of the period 1935 to 1945 its operations were conducted by Trustees appointed by this Court pursuant to provisions of The National Bankruptcy Act. That the properties of the defendant, The Western Pacific Railroad Company, were released to it by the said Trustees as of December 31, 1944 for corporate operation and such operation still continues. That prior to November 22, 1943, all of the capital stock of the defendant, The Western Pacific Railroad Company, was held by the plaintiff which had issued shares of its own stock thereagainst. That this arrangement was made for the reason that under certain provisions in the corporate law of California, since repealed, there was a problem of stockholders' liability. That subsequent to November 22, 1943, but prior to December 31, 1944, the capital stock of the defendant, The Western Pacific Railroad Company, theretofore owned by the



plaintiff, was delivered to the Reorganization Committee of the defendant, The Western Pacific Railroad Company, to facilitate its reorganization which was consummated as of said last mentioned date. That from time to time prior to November 22, 1943, the plaintiff served as banker for the defendant, The Western Pacific Railroad Company, and advanced to it and to its subsidiaries sums of money which they agreed to repay.

## VII.

That in 1925, the defendant, The Western Pacific Railroad Company, acquired at a cost of approximately \$4,500,000 all of the capital stock and mortgage indebtedness of the Sacramento Northern Railway, one of the defendants herein, being 10,000 shares of common stock (\$100 par value) and \$5,224,373 mortgage bonds, which securities were purchased by the defendant, The Western Pacific Railroad Company, from the plaintiff and which securities the plaintiff at the request of said defendant, The Western Pacific Railroad Company, had acquired and held until such time as the defendant, The Western Pacific Railroad Company, could obtain from the Interstate Commerce Commission the necessary authority under the Interstate Commerce Act to control the defendant, Sacramento Northern Railway. That the interim ownership or control of said Sacramento Northern Railway by the plaintiff was an arrangement entered into at the request and for the convenience of the defendant, The Western Pacific Railroad Company, which desired to own and control said Sacramento Northern Railway for the purpose of securing access to valuable traffic

in interchange originating in the Sacramento Valley. That the defendant, Sacramento Northern Railway, then owned and has continued to own and operate an interurban electric railway engaged in transporting both passengers and freight located in the rich traffic producing territory of the Sacramento Valley extending from Sacramento to Chico, with branches to Oroville, Colusa, and Woodland, and a detached line running southwesterly from Vacaville. That authority has been granted to construct additional lines including a line approximately 16 miles in length extending southerly from a connection with the line of the San Francisco-Sacramento Railroad Company, hereinafter mentioned, at a point 7 or 8 miles south of Sacramento. That it is stated in the Report of the Interstate Commerce Commission authorizing the defendant, The Western Pacific Railroad Company, to acquire control of the defendant, Sacramento Northern Railway:

“As the Western Pacific will hold over 99% of the Railroad Company's Bonds, which constitute its funded debt, the value of the properties to the Western Pacific from the standpoint of earnings will be measured by the Railroad Company's gross income less miscellaneous deductions therefrom. Gross income so reduced has averaged \$292,780.43 for the period given and was \$168,335.63 in 1924. Besides the direct return which the record indicates the Western Pacific will receive as owner of the securities of the Railroad and the Railway Companies, it will also receive income because of additional traffic which will be delivered to it by the Railway Company and on which it will get its long haul to Salt Lake.”

That the plaintiff for further factual detail hereby refers to the official Report of the Interstate Commerce Commission from which the foregoing is quoted and which appears in 99 Interstate Commerce Commission Report at page 382 under title: "Finance Docket No. 1881—Proposed Control of Sacramento Northern By Western Pacific R. R." That the defendant, The Western Pacific Railroad Company, has duly reimbursed the plaintiff for all amounts provided by it prior to July 8, 1925 in the acquisition of control for its account of the defendant, Sacramento Northern Railway.

#### VIII.

That the acquisition by the defendant, The Western Pacific Railroad Company, of control of the defendant, Sacramento Northern Railway, had proved so advantageous and so profitable to the defendant, The Western Pacific Railroad Company, in the period July 8, 1925 to July 1, 1928, that it determined at or before said last mentioned date to broaden the enterprise and extend feeder lines further into the fertile areas of the Sacramento Valley by acquiring through its subsidiary the defendant, Sacramento Valley Railway, the lines of railway and other properties of the San Francisco-Sacramento Railroad Company, described in the Report of the Interstate Commerce Commission hereinafter mentioned as follows:

"(a) Extending from Oakland in a general easterly and northeasterly direction to Mallard, thence by barge and ferry across Suisun Bay, and continuing in a northeasterly direction to Sacramento; (b)

from West Pittsburg in an easterly direction to and through the city of Pittsburg; and (c) a line of railroad located on M Street in the city of Sacramento. The total mileage of main and branch line track to be acquired is 87.08 miles, in Alameda, Contra Costa, Solano, Yolo, and Sacramento Counties, Calif."

That again, as in the case of the acquisition of control of the defendant, Sacramento Northern Railway, the plaintiff was requested to advance the funds necessary to secure control in the interim in which application for control by the defendant, The Western Pacific Railroad Company, was pending in the Interstate Commerce Commission. That to this end advances were made by the plaintiff which ultimately became part of the purchase price of the properties of the San Francisco-Sacramento Railroad Company which were acquired at a total cost of \$1,675,000 as of January 1, 1929 by the defendant, Sacramento Northern Railway, pursuant to authorization of the Interstate Commerce Commission granted October 15, 1928. That the plaintiff for further factual details hereby refers to the official Report of the Interstate Commerce Commission relating to such authorization which appears in 145 Interstate Commerce Commission Report, at page 533, under title: "Finance Docket No. 7060—Acquisition by Sacramento Northern Railway of Properties of San Francisco-Sacramento Railroad Company." That except the payment of \$21,120 made January 31, 1929, for which credit has been given, neither the defendant, The Western Pacific Railroad Company, nor its subsidiary, the defendant, Sacramento Northern Railway, has re-



paid to the plaintiff any part of the principal sum advanced by it to the defendant, Sacramento Northern Railway, and has paid to the plaintiff no part of the interest thereon regularly credited to the plaintiff on the books of the defendant, Sacramento Northern Railway, and the whole amount thereof shown on the books of the defendant, Sacramento Northern Railway, in the amount of \$1,441,390 as of June 30, 1945, is due and owing to the plaintiff and for reasons hereinafter more fully stated is a first and paramount equitable lien and charge (a) upon the properties and assets of the defendant, Sacramento Northern Railway, and (b) upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the defendant, Sacramento Northern Railway to the extent that the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company which have been released under the Plan of Reorganization and Orders of this Court in the reorganization proceeding hereinbefore referred to. That the principal amount of said debt so due and owing to the plaintiff represents the unpaid balance of the purchase price of properties purchased by and now owned by the defendant, Sacramento Northern Railway, and through it by its proprietor, the defendant, The Western Pacific Railroad Company, and unless the plaintiff is accorded the preferences and priority and the equitable liens herein prayed the said defendants will be unduly enriched to that extent contrary to the cardinal principles of equity and the obligations of good conscience.



## IX.

That the priority and preferential status of the plaintiff's claim as an equitable lien and charge upon the properties and revenues of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, arise by operation of fundamental legal and equitable principles as applied to the facts hereinbefore alleged and hereinafter more fully developed and amplified:

It is a deep rooted principle of law of private property that one may deal with one's own as one will but shall not be suffered to do so in a manner that will adversely affect the property rights of others. This doctrine comes into play in corporate law as governing and limiting the right of a parent corporation to manage and deal with a wholly or partially owned subsidiary company. If the subsidiary is wholly owned and has no creditors whose interests might be affected adversely the power and authority of the parent over the subsidiary is absolute but if the ownership is not complete or if there are unpaid creditors of the subsidiary the power and authority of the parent is curtailed to the extent necessary to protect the outstanding interest. It is an accepted, broad, equitable principle that corporate autonomy will not be upheld to permit fraud or injustice. This principle is particularly applicable in dealing with controlled or wholly owned subsidiary corporations which are the instrumentalities of the controlling corporation. The philosophy of this rule sometimes referred to as the "Deep Rock Doctrine" is developed in the Opinion written by Mr. Justice Douglas for the Supreme Court in *Pepper v. Litton*,

308 U. S. 295, interpreting the earlier case of *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307 and is elaborated in an Article by Professor Wormser in 12 *Columbia Law Review* entitled "Piercing the Veil of Corporate Entity". From the inception of the ownership and control by the defendant, The Western Pacific Railroad Company, of the defendant, Sacramento Northern Railway, it has exercised all the rights and privileges of complete proprietorship, and has utilized the lines and facilities of its subsidiary (as it was proper it should do and as it had formally advised the Interstate Commerce Commission it intended to do) to develop and secure long haul traffic for its own rails between the Sacramento Valley, in California, and Salt Lake City in the State of Utah. In the early years of its proprietorship the properties of the defendant, Sacramento Northern Railway, yielded a substantial return upon the capital invested therein. The property was self-sustaining and would have continued to be so if its earning power had not been curtailed by its merger in 1929 with the properties of the San Francisco-Sacramento Railroad Company which was purchased at a cost of \$1,675,000 at a time when it had ceased to be self-sustaining, was operating at a deficit and was threatened with proceedings in abandonment. The combination of these properties produced an enlarged enterprise which was a valuable adjunct to the defendant, The Western Pacific Railroad Company, but which never earned for itself and its creditors any return upon the capital invested therein. There was no effort on the part of the defendant, The Western Pacific Railroad Company, to so man-

age the combined properties as to develop a self-sustaining earning power and there was no reason for such effort so long as it recognized the prior and paramount equity of the plaintiff's claim for repayment with lawful interest of its advances to the defendant, Sacramento Northern Railway. In railway economics the defendant, Sacramento Northern Railway, was in a special category known as "an originating carrier." Such a carrier gathers and distributes traffic which moves only a short distance over its own rails and does not produce sufficient revenue for the short line haul to pay the cost of the service. To compensate it for its service and keep it in business it is given by connecting lines a higher percentage of the revenue than a division on a mileage basis which is known as an arbitrary. This varies in amount in relation to the facts of each case. One of the objectives of The Western Pacific Railroad Company in acquiring control of the defendant, Sacramento Northern Railway, in 1925 was to avoid such an arbitrary and permit it to retain, as it subsequently did, all of the revenue derived from its own long haul of traffic originating on the line of the Sacramento Northern Railway. For more than 15 years the defendant, The Western Pacific Railroad Company, has retained all of such revenues without being asked to account to Sacramento Northern Railway for any part thereof so as to provide it with funds for the repayment of the advances made to it by the plaintiff. In such an accounting the defendant, The Western Pacific Railroad Company, as the result of judicial and administrative decisions which stem back to the case of St. Louis &

San Francisco Ry. Co. v. Gill, 156 U. S. 649, 665, will not be permitted to apply its over-all operating ratio to the business interchanged with its subsidiary, the defendant, Sacramento Northern Railway, but will be accountable to it for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto. The exact amount of such revenues is unknown and could only be determined as the result of an intricate accounting but the plaintiff alleges that the amount of such revenues approximates or exceeds \$20,000,000. In the period in which the defendant, The Western Pacific Railroad Company, retained these revenues on traffic delivered to it by the Sacramento Northern Railway it did not credit to the defendant, Sacramento Northern Railway, any interest payments on \$5,227,706 of Bonds of the Sacramento Northern Railroad (predecessor Company Bonds assumed by Sacramento Northern Railway) and did not credit to the defendant, Sacramento Northern Railway, any payment on account of principal or interest on advances which it had made in amounts (some represented by notes, some by open account) aggregating \$9,425,000 but allowed interest claims to back up and accumulate so that as of June 30, 1945 the defendant, The Western Pacific Railroad Company, appeared from the books of account to be a creditor of the defendant, Sacramento Northern Railway, in the amount of \$22,964,324. Although this indebtedness is still carried on such books it has not been treated by the defendant, The Western Pacific Railroad Company, as lawful indebtedness which it could enforce to the detriment of the plaintiff as creditor of the defend-

ant, Sacramento Northern Railway. That this is the position of the defendant, The Western Pacific Railroad Company, is clear from its course of conduct as outlined above and as fortified by its action in causing the valid and unpaid indebtedness of the plaintiff in the principal amount of \$856,260 to be pledged with The Railroad Credit Corporation as Accommodation Collateral for a loan obtained by the defendant, The Western Pacific Railroad Company, from The Railroad Credit Corporation without then asserting that it held claims against the defendant, Sacramento Northern Railway, aggregating \$22,964,324 or thereabout, or nearly double the amount of the then total assets of the Sacramento Northern Railway as shown by its books. That said loan has been fully satisfied and The Railroad Credit Corporation fully indemnified out of collateral furnished by The Western Pacific Railroad Company without resort to the Accommodation Collateral. Applying the Deep Rock Doctrine to the debts appearing on the books of the defendant, Sacramento Northern Railway, to (1) the plaintiff, and (2) the defendant, The Western Pacific Railroad Company, there could be little question that the defendant, The Western Pacific Railroad Company, would not be permitted to interpose the book credits of its wholly owned subsidiary, the defendant, Sacramento Northern Railway, as against the debt of the latter to the plaintiff even if such debt had not acquired an independent status as the result of the reorganization consummated as of December 31, 1945. But there can be no question at all on that point now that the plaintiff has acquired an independent status



as the result of said reorganization. The unpaid loans of the plaintiff to the defendant, Sacramento Northern Railway, were of value and benefit to it only so long as the inter-corporate relationship existed between it and the defendant, the Western Pacific Railroad Company. When the reorganization of said last mentioned Company was effected by its security holders and the entire stockholdings of the plaintiff in said last named defendant were surrendered its loans to the defendant, Sacramento Northern Railway, and the plaintiff itself acquired each an independent status and the plaintiff stepped into the position of any creditor of the Sacramento Northern Railway other than its proprietor, the defendant, The Western Pacific Railroad Company. Any other benefit to the plaintiff as the result of the making of the loans to the Sacramento Northern Railway, thereupon disappeared. On the other hand all benefits which the defendant, The Western Pacific Railroad Company, obtained by the making of the loans to the defendant, Sacramento Northern Railway, for the maintenance of a continuous flow of traffic continued. The creditors of the defendant, The Western Pacific Railroad Company, who succeeded to its ownership in the reorganization accepted this ownership with knowledge that the prior owner, the plaintiff, had loaned money to a wholly owned subsidiary, the Sacramento Northern Railway, and that the creditor making this loan would achieve a wholly independent status upon the effectuation of the reorganization. Equity will not permit the reorganized The Western Pacific Railroad Company to interpose its own alleged credits to its subsidiary in an amount

which would render the independent claim of the plaintiff substantially valueless while retaining for itself all of the benefits enjoyed by its continuance of the ownership of the defendant, Sacramento Northern Railway.

## X.

That an analysis of the accounts of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, in relation to the earnings of each from interchanged traffic and a restatement of such accounts on the basis of an appropriate formula will, as the plaintiff verily believes, show that the defendant, The Western Pacific Railroad Company, has absorbed earnings of the Sacramento Northern Railway far in excess of the full amount of the principal of and accrued interest upon the plaintiff's claim in the amount of \$1,441,390.55.

## XI.

That the defendant, American Trust Company, is Trustee under an Indenture dated July 1, 1918, securing Bonds outstanding in the amount of \$5,224,373 or thereabouts. Said Indenture and the Bonds issued thereunder were executed by Sacramento Northern Railroad and were assumed by the defendant, Sacramento Northern Railway and constitute a lien upon properties for which the aforesaid principal sum of \$856,260 represents unpaid purchase money, and as Trustee under said Indenture said American Trust Company has an interest in the subject matter of this suit.

Wherefore, the plaintiff prays:

1. That the plaintiff's claim in the amount of \$1,441,390.55 be adjudged and decreed to be secured by a first and paramount lien on all of the properties of the defendant, Sacramento Northern Railway and an equitable charge against the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic delivered to it by the defendant, Sacramento Northern Railway.

2. That the defendant, The Western Pacific Railroad Company, be directed and decreed to account to the defendant, Sacramento Northern Railway, for the benefit of the plaintiff as its sole creditor for its just and equitable share as originating carrier of all revenues received and retained by the defendant, The Western Pacific Railroad Company, in traffic delivered to it by the Sacramento Northern Railway up to but not in excess of \$1,441,390.55 and be directed and decreed to pay the amount so found to be due to the defendant, Sacramento Northern Railway for account of the plaintiff.

3. That in default of full payment of said sum the plaintiff have leave to apply to this Court at the foot of the decree herein for such further relief by way of judicial sale of and interim receivership of the properties of the defendant, Sacramento Northern Railway, as circumstances may require and as may be agreeable to the usages of equity.

4. That the plaintiff may have such other and further relief as to the Court may seem meet.

Dated July 9, 1946.

THE WESTERN PACIFIC RAILROAD CORP.,

By LEROY R. GOODRICH,  
Its Attorney.

Of Counsel:

F. C. NICODEMUS, JR.,  
A. PERRY OSBORN.

[Endorsed]: Filed Aug. 30, 1946.

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[Title of District Court and Cause.]

ORDER TO THE WESTERN PACIFIC RAIL-  
ROAD CORPORATION TO SHOW CAUSE  
WHY IT SHOULD NOT BE ADJUDGED  
GUILTY OF CONTEMPT

It appearing by the verified petition of The Western Pacific Railroad Company, debtor (now discharged) in the above-entitled proceeding, that the Western Pacific Railroad Corporation, a party to this proceeding, has commenced an action in this Court (No. 26333-H) which asserts a claim against the said The Western Pacific Railroad Company in violation of this Court's Final Order in this proceeding date March 28, 1946; and the Court being fully advised, it is hereby

Ordered, that The Western Pacific Railroad Corporation show cause before this Court in the courtroom of the undersigned judge of said Court, in the United States Post Office and Court House Build-

ing, in the City and County of San Francisco, State of California, on the 23rd day of September, 1946, at 10 o'clock A.M., why it should not be adjudged guilty of and punished for contempt of this Court for violation of the said Final Order dated March 28, 1946, and why this Court should not grant petitioner such other and further relief, including its costs and damages, as may be proper in the premises.

Service of this order, together with a copy of the petition upon which it was granted, on or before September 10, 1946, shall be sufficient service thereof.

Dated: August 30, 1946.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 30, 1946.

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[Title of District Court and Cause.]

ANSWER AND RETURN OF THE WESTERN  
PACIFIC RAILROAD CORPORATION TO  
PETITION AND TO ORDER TO SHOW  
CAUSE

Comes now The Western Pacific Railroad Corporation and in answer to the petition of The Western Pacific Railroad Company, in the above-entitled proceeding, and in conformity with the order of the court to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of and punished for contempt of



this court for violation of its final order dated March 28, 1946, and respectfully shows:

I.

This respondent admits that on the 24th day of August, 1946, it commenced in this court an action numbered 26333-H, entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants."

II.

Respondent denies that the filing of said action constitutes a violation of the final order of this court in the above-entitled bankruptcy proceeding dated March 28, 1946, for the following reasons:

(1) The basic purpose of the injunctive order made by this court on March 28, 1946, was to prevent any attempt to relitigate matters concluded by the reorganization proceedings brought to a close by said order.

(2) The Bill of Complaint filed by The Western Pacific Railroad Corporation on August 24, 1946, in this court numbered 26333-H, does not seek in any manner to violate the terms of the injunctive order nor to relitigate any matters concluded by the reorganization proceedings. On the contrary it was drawn by the plaintiff therein with meticulous care not to infringe upon either the letter or the spirit of the injunctive inhibition.

(3) The Bill asserts, in paragraphs IV and V

thereof, a primary claim against one of the defendants named therein, Sacramento Northern Railway, for money due the plaintiff on an indebtedness as set forth therein. It seeks to secure primarily a money judgment or decree against Sacramento Northern Railway on a claim for money loaned to Sacramento Northern Railway and unpaid, the validity of which claim is not disputed, and to enforce such judgment of decree, if secured, against the property of that defendant.

(4) Secondly, the Bill seeks to secure from the Defendant, The Western Pacific Railroad Company, an accounting to Sacramento Northern Railway, for the benefit of the plaintiff, as the creditor of the latter corporation, for its just and equitable share as originating carrier to all revenues, if any, received and retained by The Western Pacific Railroad Company in traffic delivered to it by the Sacramento Northern Railway up to but not in excess of the claim of the plaintiff against Sacramento Northern Railway.

(5) It must be clear to the court that the Bill of Complaint in no way asserts a general and direct claim against The Western Pacific Railroad Company. Its claim is primarily against Sacramento Northern Railway. It has included in this complaint The Western Pacific Railroad Company only because The Western Pacific Railroad Company, as it set forth in said complaint, collects and holds moneys arising out of interline business and interline settlements which are due to and the property of Sacramento Northern Railway.

(6) No relief is asked against The Western Pa-

cific Railroad Company, except in the event that (a) it can establish in this court its right to secure satisfaction of said indebtedness from Sacramento Northern Railway, and (b) it cannot secure full satisfaction of said indebtedness. In such an event it seems clear to this plaintiff that it should then be able to require of The Western Pacific Railroad Company an accounting to Sacramento Northern Railway for any amounts which may be due the latter under unsettled, unadjusted interline accounts between these two autonomous carriers.

The principle is well settled that interline settlements among carriers for the amounts due thereunder are accorded a preference over mortgage liens. This principle is well established and is sustained by the authorities cited and attached hereto.

(7) The same principle underlies prior orders of this court which specified claims which The Western Pacific Railroad Company, or its reorganization trustees, might pay currently out of income impounded by the mortgage trustees including "claims arising out of rate divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting shipments with transit or storage privileges and other charges or judgments of like character between carriers in the conduct of their joint business, regardless of when accrued."

In the order of the Interstate Commerce Commission of June 21, 1939, constituting the Plan of Reorganization which it then certified to the Dis-

trict Court there is excluded from the operation of the Plan "claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the Trustees of the property of the debtor during the reorganization proceedings, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company."

(8) It is therefore quite obvious that the District Court did not have the power or jurisdiction under Section 77 to deal injunctively or otherwise with the kind of a claim plaintiff now seeks to enforce against Sacramento Northern Railway primarily and against the Reorganized Company, only to the extent of amounts due on interline settlements.

(9) Nor does an examination of the critical orders entered in the reorganization proceeding indicate any attempt on the part of the District Court to interfere with a litigation of claims of this character, but on the contrary such orders seem clearly to recognize their excepted status.

(10) The Bill of Complaint filed by The Western Pacific Railroad Corporation, insofar as it seeks relief against The Western Pacific Railroad Company, is expressly limited and stated in paragraph VIII thereof (page 7) to be a claim "upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the defendant, Sacramento Northern Railway, to the extent that

the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company, which have been released under the Plan of Reorganization and orders of this Court in the reorganization proceeding hereinbefore referred to."

As to the claims so set forth in its Bill, The Western Pacific Railroad Corporation, respondent, respectfully expresses its belief that it is entitled to its day in court and therefore prays that it be found not guilty of any violation of any injunctive order of this court and that it be discharged and purged of any charge of contempt.

THE WESTERN PACIFIC  
RAILROAD CORPORATION

By .....  
Its Attorney.

Of Counsel

F. C. NICODEMUS, JR.,  
A. PERRY OSBORN.

State of California,  
County of Alameda—ss.

Leroy R. Goodrich, being first duly sworn, deposes and says:

That he is the attorney for The Western Pacific Railroad Corporation answering herein; that said corporation is absent from the County of Alameda; that your affiant maintains his law office in the County of Alameda, State of California, and makes this affidavit for and on behalf of said The Western Pacific Railroad Corporation; that he has read the



foregoing Answers, etc., and knows the contents thereof and that he knows of his own knowledge that all of the allegations set forth therein are true.

/s/ LEROY R. GOODRICH.

Subscribed and sworn to before me this 21st day of September, 1946.

(Seal) JOHN A. BRENNAN,  
Notary Public in and for the County of Alameda,  
State of California.

## MEMORANDUM OF POINTS AND AUTHORITIES

Order of Interstate Commerce Commission, June 21, 1939, certifying Plan of Reorganization.

Order of District Court approving plan August 15, 1940, paragraph 3, subsection (b).

Order of District Court directing carrying out of Plan November 27, 1944, section 9.

Final order of District Court March 28, 1946, paragraph 6.

Booth v. Hoskins, 75 Cal. 271, 3 Jones on Bonds and Bond Securities, 4th Ed. Secs. 1356; 1358, pp. 145, 149.

Miltenberger v. Logansport Railway, 106 U.S. 286, 311, 312.

Farmers Loan and Trust Company v. Vicksburg & M. Railway Co. 33 Fed. 778.

Easton v. Houston & T. C. Ry. Co. 38 Fed. Rep. 12.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

Reply of Petitioner, The Western Pacific Railroad Company, to Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

Comes now the petitioner, The Western Pacific Railroad Company, and, by leave of Court, files its reply to the answer and return of The Western Pacific Railroad Corporation to petition and to order to show cause herein, insofar as reply is deemed necessary, and respectfully shows:

I.

Petitioner denies:

(a) that said Bill of Complaint sets forth that petitioner “collects and holds moneys arising out of interline settlements which are due to and the property of Sacramento Northern Railway.” (Sub-paragraph (5), Section II, p. 3);

(b) that said Bill of Complaint seeks “to require of The Western Pacific Railroad Company an accounting to Sacramento Northern Railway for any amounts which may be due the latter under unsettled, unadjusted interline accounts between these two autonomous carriers” (Sub-paragraph (6), Sec. II, p. 3);

(c) that the claim which the respondent now seeks to enforce against the petitioner “is only to the extent of amounts due on interline settlements” (Sub-paragraph (8), Section II, p. 4).

In this behalf petitioner alleges that nowhere in said Bill of Complaint it is alleged that any amount

is or has been due or unpaid from petitioner to Sacramento Northern Railway on any interline settlement made in accordance with agreed or established bases for the division of rates and revenue between connecting carriers, or that any amount is or has been due and owing from petitioner to Sacramento Northern Railway under unsettled, unadjusted interline accounts, or that there are or have been any such unsettled or unadjusted interline accounts between said Sacramento Northern Railway and petitioner. On the contrary, it appears upon the face of said Bill of Complaint that the respondent seeks a retrospective redetermination of divisions of rates and thereby a re-allocation of revenues to the Sacramento Northern Railway and The Western Pacific Railroad Company, respectively, on business originating on the Sacramento Northern Railway and interchanged with The Western Pacific Railroad Company for a period in excess of fifteen years; that the Bill of Complaint seeks "a restatement" of the interline accounts between the Sacramento Northern Railway and petitioner throughout said period in excess of fifteen years, and prays that, after such restatement shall have been made, the petitioner be required to account to Sacramento Northern Railway, and thereby to the respondent, in amounts alleged by the Bill of Complaint to be much greater than the amounts shown in the actual interline accounts and interline settlements between said Sacramento Northern Railway and petitioner.

## II.

Petitioner denies that the claim which respondent

seeks by its Bill of Complaint to enforce against the petitioner is a claim "against the debtor entitled to priority over any mortgage of the debtor" or that said claim had or has an "excepted status." (Sub-paragraphs (7), (9) and (10) of Section II, pp. 4 and 5.) In this behalf petitioner alleges that said claim was an unsecured claim, and not entitled to priority over any mortgage, when it accrued in 1928 as alleged in the Bill of Complaint and that, as appears from the Bill of Complaint, it continued to be an unsecured claim and not entitled to priority over any mortgage throughout the entire period of more than sixteen years from the date of its alleged accrual until the consummation of the reorganization of The Western Pacific Railroad Company.

Wherefore petitioner prays that this Court shall find and determine that the said answer and return of The Western Pacific Railroad Corporation to the petition and to the order to show cause herein fails to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of, and punished for, contempt of the said Final Order of this Court, and that the Court shall further find that petitioner is entitled to the relief prayed for by its petition herein.

/s/ ALLAN P. MATTHEW,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for The Western  
Pacific Railroad Company.

Of counsel

McCutchen, Thomas, Matthew, Griffith &  
Greene.

State of California,  
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Company. That he has read the foregoing reply and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CHARLES ELSEY.

Subscribed and sworn to before me this 1st day of October, 1946.

(Seal) /s/ FRANK L. OWEN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 2, 1946.

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[Title of District Court and Cause.]

Order Adjudging the Western Pacific Railroad Corporation Guilty of Contempt of the Final Order of This Court Herein.

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing



and was heard by the Court pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court, being fully advised, finds:

(a) That The Western Pacific Railroad Corporation is a corporation created and existing under the laws of the State of Delaware, and is a party to the above-entitled reorganization proceeding.

(b) That a copy of the Final Order of this Court made and filed herein on March 28, 1946, was duly served on The Western Pacific Railroad Corporation within thirty days after March 28, 1946.

(c) That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that said Final Order has become final and is now in full force and effect.

(d) That on August 24, 1946, said The Western Pacific Railroad Corporation commenced in this Court an action against the petitioner and others numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants"; and that on August 27, 1946, the petitioner was served with the summons and a copy of the bill of complaint in said action, a copy of which bill of complaint is attached to and incorporated in said petition.

(e) That said action No. 26333-H is still pending in this Court.

(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this Court.

(g) That in commencing and in maintaining said action against The Western Pacific Railroad Company, The Western Pacific Railroad Corporation has violated and continues to violate said Final Order of this Court in this proceeding.

The Court further finds and concludes that The Western Pacific Railroad Corporation is guilty of contempt of said Final Order of this Court in commencing and maintaining said action No. 26333-H against The Western Pacific Railroad Company.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation is in contempt of this Court.

2. That The Western Pacific Railroad Corporation shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and

damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 26333-H against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

3. That The Western Pacific Railroad Corporation may purge itself of such contempt by dismissing its said action No. 26333-H as to The Western Pacific Railroad Company within the period of fifteen (15) days following service of a copy of this order upon counsel for The Western Pacific Railroad Corporation, and in case it shall so dismiss said action within said fifteen-day period The Western Pacific Railroad Corporation shall be released from its obligation to make payment to The Western Pacific Railroad Company as provided in the preceding paragraph of this order.

Dated: March 19, 1947.

/s/ A. F. ST. SURE,  
Judge.

[Endorsed]: Filed Mar. 20, 1947.

[Title of District Court and Cause.]

Petition of the Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946.

The Western Pacific Railroad Corporation, a corporation of the State of Delaware, herein called the "Petitioner," represents to this Court and petitions as follows:

1. The Petitioner is a creditor of Sacramento Northern Railway, a wholly owned subsidiary of The Western Pacific Railroad Company, debtor in these proceedings, the indebtedness due including interest accrued to June 30, 1947, amounting to \$1,511,606.21.

2. Said Sacramento Northern Railway is without funds or liquid or unmortgaged assets with which to pay such indebtedness, but as the Petitioner is informed and verily believes to be true, it has a just and equitable claim against its parent said Western Pacific Railroad Company in an amount more than sufficient to discharge all of said indebtedness, principal and interest; such claim being one arising out of unaudited and unsettled inter-line carrier accounts between said Sacramento Northern Railway and said Western Pacific Railroad Company.

3. The Petitioner, as a creditor of said Sacramento Northern Railway, has an equitable right to bring and prosecute a derivative action against said Western Pacific Railroad Company in favor of the

Sacramento Northern Railway (since any suit brought by Sacramento Northern Railway itself against said Western Pacific Railroad Company, its own parent would in contemplation of a court of equity be a suit by the parent against itself) to enforce said claim and to require Sacramento Northern Railway to apply the moneys recovered in such action upon said claim to the payment of the Petitioner's claim against Sacramento Northern Railway in the amount of \$1,511,606.21, but for the reasons hereinafter set forth and alleged the Petitioner is unwilling to institute, prosecute or pursue or attempt to institute, prosecute or pursue such a derivative suit against said Western Pacific Railroad Company unless and until this Court shall clarify or modify the sweeping injunctive provisions of its Final Order of March 28, 1946, which are alleged to inhibit and bar such relief against the Western Pacific Railroad Company.

4. The derivative action which the Petitioner represents that it is equitably entitled to prosecute against said Western Pacific Railroad Company is based upon the following state of facts: for many years the Sacramento Northern Railway has owned and operated an interurban electric railway engaged in transporting both passengers and freight to and from the rich and productive territory in and tributary to the Sacramento Valley, the line extending from Sacramento to Chico, with branches to Oroville, Colusa and Woodland, and a detached line running southwesterly from Vacaville. In or about 1928 the Sacramento Northern Railway acquired



lines of railroad from or of the San Francisco-Sacramento Railroad Company for the purpose of extending the traffic producing territories from which its parent, said Western Pacific Railroad Company, would derive additional long-haul revenue producing traffic. By this means additional areas were opened up to said Western Pacific Railroad Company in Alameda, Contra Costa, Solano, Yolo and Sacramento Counties, at a total cost of \$1,675,000 of which the principal indebtedness due the Petitioner from said Sacramento Northern Railway is or represents a part.

5. Said Sacramento Northern Railway enlarged in the manner and by the process above outlined has always been operated autonomously, although some if not all of its organization or personnel are also officers or employees of its parent, said Western Pacific Railroad Company, and all of the traffic originated and gathered by it has been delivered by it to said Western Pacific Railroad Company as a connecting carrier in accordance with the usages and practices of the railway industry and with the provisions of the Interstate Commerce, all of which require just and equitable rates and fair and equitable division thereof between connecting and participating carriers. Such method of operation was pursued by said Western Pacific Railroad Company prior to the appointment in 1935 of Trustees in this proceeding, was continued by the Trustees during the full period of the trusteeship and since the trusteeship ended has been pursued by the reorganized Western Pacific Railroad Company but at

no time during any of these three operating periods has there been an audit and judicial settlement of the inter-line accounts of and between Sacramento Northern Railway and said Western Pacific Railroad Company and its Trustees.

6. Under the law and usages and practices of the railroad industry inter-line accounts are running accounts which are subject to audit at any time without regard to the statutes of limitation because the statutes always run from the date of the latest entry and new entries occur daily and under a long line of judicial decisions in federal courts any credit balance shown to be due on such an audit is a preferential claim entitled to priority over mortgage liens.

7. The Petitioner respectfully represents that Sacramento Northern Railway is entitled to an audit of its inter-line accounts with Western Pacific Railroad Company and that such an audit will show that at all times the division of through rates on inter-changed business has involved a loss to Sacramento Northern Railway and a profit to Western Pacific Railroad Company, except that in certain war years said Sacramento Northern Railway was also operating profitably. The Petitioner further represents that said Western Pacific Railroad Company has received in business delivered to it by Sacramento Northern Railway more than \$21,000,000 of gross revenue of which under any just segregation formula more than 50% would be net profit fairly and justly chargeable against said Western Pacific Railroad Company in any equit-

able retroactive adjustment of the divisions underlying such inter-line settlements.

8. The Petitioner respectfully represents that the Final Order of March 28, 1946, was not intended by the Court to interfere with or interdict the normal and customary accounting practices and commercial relations between said Western Pacific Railroad Company or its Trustees and its connecting carriers and was not intended to legislate new or shortened periods of limitation or to permit the reorganized Western Pacific Railroad Company to gain any unconscionable advantage over any person having a just and equitable claim against the trust estate or against its Trustees but by reason of the broad injunctive provisions of the said Order of March 28, 1946, it is claimed that connecting carriers of said Western Pacific Railroad Company and all carriers participating in the transportation of traffic received from or delivered to said Western Pacific Railroad Company are barred from any audit or judicial settlement of their accounts prior to December 28, 1944.

9. The Petitioner further represents that the true intent and purpose of the Final Order of March 28, 1946, was to prevent the reassertion of claims against the Debtor Railroad Company which existed at the date the Debtor's properties were placed in judicial custody, August 2, 1935, and which were cut off or intended to be cut off by the Plan of Reorganization as of its effective date January 1, 1939, and was not intended to cut off valid and subsisting claims against the Trustees created by or resulting from business transacted

by and with the Trustees during the period of judicial operation and administration; in short this Court did not by its Order of March 28, 1946, intend to repudiate any of its own obligations or what is tantamount thereto, the obligations of its Trustees.

Accordingly, the Petitioner respectfully asks that this Court enter a supplemental Order clarifying or amending its Final Order of March 28, 1946, so as to permit the Petitioner to institute a suit against, or to reform a suit heretofore instituted against, Sacramento Northern Railway, said Western Pacific Railroad Company and others (but dismissed as to the Western Pacific Railroad Company on April 18, 1947) by setting forth in the right of Sacramento Northern Railway its claim against Western Pacific Railroad Company for a judicial settlement of their interline carrier accounts for the periods: (a) from the date of the audit to December 28, 1944, being the post reorganization period; (b) from December 28, 1944, to August 2, 1935, being the full period of judicial operation; and (c) from August 2, 1935, back to and through, but not beyond the period in which such settlements are entitled to priority over then existing mortgage indebtedness of said Western Pacific Railroad Company and are expressly exempted from the injunctive provisions of the Order of March 28, 1946, and that this Court grant such other and further relief in the premises as to the Court may seem meet.

Upon the hearing of this petition, the Petitioner with the permission and under the protection of

this Court will be prepared to submit the form of Bill of Complaint which they desire to file.

All of which is most respectfully submitted.

Dated: August 18, 1947.

THE WESTERN PACIFIC  
RAILROAD CORPORATION,

By /s/ LEROY R. GOODRICH,  
Its Attorney.

Of Counsel

FRANK C. NICODEMUS, JR.,  
A. PERRY OSBORN.

State of New York,  
County of New York—ss.

M. J. Curry, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Corporation; that he has read the foregoing Petition and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ M. J. CURRY.

Subscribed and sworn to before me this 18th day of August, 1947.

(Seal) /s/ HOWARD A. FISCHER,

Notary Public in the State of New York. Residing  
in Kings County.

Commission expires March 30, 1948.

[Endorsed]: Filed Sept. 30, 1947.



[Title of District Court and Cause.]

Answer and Return of The Western Pacific Railroad Company to Petition of the Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946.

Comes now The Western Pacific Railroad Company, Debtor (now the Reorganized Company and hereinafter referred to as the Company) in the above-entitled proceeding, and for its answer and return to the "Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, dated March 28, 1946" (hereinafter referred to as the petition), respectfully shows:

### FIRST DEFENSE

#### Reply to Allegations of Petition

1. Answering the allegations of paragraph 1 of the petition, denies that Petitioner is a creditor of Sacramento Northern Railway in the sum of \$1,511,-606.21 or any other sum and alleges that Petitioner's asserted claim against Sacramento Northern Railway originated in 1928 and has long since been barred by the Statute of Limitations.

2. Answering the allegations of paragraph 2 of the petition, denies that Sacramento Northern Railway has a just or equitable or any claim against the Company arising out of unaudited or unsettled interline carrier accounts. In this behalf alleges that the terms "interline account" and "interline settlement" are conventional terms, having in rail-

road accounting practice well recognized and established meanings, viz:

(a) An "interline account" is a monthly statement or report rendered by one carrier to another showing the apportionment of revenues on interline traffic in the transportation of which they both participate, that is, on traffic interchanged between them (including traffic in the transportation of which other carriers also participate), and showing also the net sum payable by or to the reporting carrier, such apportionment of revenues being determined in accordance with the tariff rates and the divisions of such tariff rates currently applicable, as established either by agreement or by order of the Interstate Commerce Commission or of other regulatory authority.

(b) On "interline settlement" is the payment by the debtor carrier to the creditor carrier of the net balance shown to be due under the interline accounts so rendered by such carriers to each other for the same period. Further alleges that it has long been, and continuously was throughout the entire period specified in the petition herein, and now is the customary and established practice in the railroad industry for carriers to render interline accounts, to audit the same and to make interline settlements in each month for the business interchanged between them during the immediately preceding calendar month. Further alleges that ever since they have interchanged traffic the Company and the Sacramento Northern Railway have had agreed and established divisions of rates covering such traffic and

upon the basis thereof and in accordance with the aforesaid customary and established practice in the railroad industry they have rendered monthly, each to the other, interline accounts covering the business interchanged between them during the immediately preceding calendar month, which accounts were thereupon audited and within the month the interline settlements of such accounts were made, all in the regular course of business, except that in certain instances and by reason of special circumstances an interline settlement may have been deferred for a period not exceeding a few months. Further alleges that there are not now nor were there at the time when Petitioner filed its said petition herein any unaudited or unsettled interline accounts between the Company and said Sacramento Northern Railway relating to or covering any business interchanged between them either during the period preceding August 2, 1935, or during the period extending from August 2, 1935 to December 28, 1944, referred to in the petition herein as "the full period of judicial operation," but that all of the interline accounts for said periods have long since been audited, settled and closed. Denies that the claim which Petitioner seeks leave to assert in behalf of Sacramento Northern Railway is a claim for unaudited or unsettled interline carrier accounts and alleges that said claim is in fact a claim for a retroactive readjustment of the divisions of rates on the business that has been interchanged between the Company and Sacramento Northern Railway for an indefinite period extending many years into the past and,

based thereon, a reallocation of the revenues on such business to Sacramento Northern Railway.

3. Answering the allegations of paragraph 3 of the petition, denies that Petitioner, as creditor of Sacramento Railway or otherwise, has an equitable or any right to bring or prosecute a derivative or any action against the Company, either in favor of Sacramento Northern Railway or otherwise, to enforce any claim whatever and particularly any claim originating or existing prior to December 28, 1944.

4. Answering the allegations of paragraph 4 of the petition, denies that Petitioner is equitably or otherwise entitled to bring any derivative action against the Company and denies that any indebtedness is due from Sacramento Northern Railway to Petitioner.

5. Answering the allegations of paragraph 5 of the petition, admits that most but denies that all of the traffic originated and gathered by Sacramento Northern Railway has been delivered to the Company and alleges the fact to be that some of such traffic was delivered by the Sacramento Northern Railway to other connecting carriers. Alleges that the interline accounts between Sacramento Northern and the Company have been regularly, currently and duly audited and settled monthly as hereinbefore alleged and denies that there ever has been or that there now is any occasion for any judicial settlement thereof.

6. Answering the allegations of paragraph 6 of the petition, denies each and all of the allegations of said paragraph 6.

7. Answering the allegations of paragraph 7 of

the petition, denies each and all of the allegations of said paragraph 7.

8. Answering the allegations of paragraph 8 of the petition, denies that Petitioner or Sacramento Northern Railway has any just or other claim against the Company originating prior to December 28, 1944 and denies that said Final Order of March 28, 1946, enjoins the assertion or enforcement of any claim existing prior to December 28, 1944 that was not intended to be enjoined thereby, and denies generally the correctness of Petitioner's interpretation of said Final Order as in said paragraph 8 of the petition set forth.

9. Answering the allegations of paragraph 9 of the petition, denies that either Petitioner or Sacramento Northern Railway has any valid or subsisting claim against the Company created by or resulting from either (a) the business transacted by the Trustees of the Company's properties during the period of reorganization extending from August 2, 1935, to December 28, 1944, referred to in the petition herein as "the full period of judicial operation", or (b) the business transacted by the Company prior to the filing of its petition for reorganization on August 2, 1935, and denies generally the correctness of Petitioner's interpretation of said Final Order of March 28, 1946, as in said paragraph 9 of the petition set forth.

10. Answering the paragraph commencing on line 7 and ending on line 27 of page 6 of the petition, denies that Petitioner is entitled to the relief or any of the relief in said paragraph prayed for.

11. Denies each and all of the allegations of said petition not specifically admitted in this Answer.



## SECOND DEFENSE

Petitioner's Claim for a "Clarification" of the Final Order Herein Dated March 28, 1946 Has Already Been Determined Adversely to Petitioner and is Barred as Res Judicata

As a further answer and return to Petitioner's said petition the Company respectfully shows:

1. By its said petition Petitioner represents that it is a large creditor of Sacramento Northern Railway, a wholly-owned subsidiary of the Company; that Sacramento Northern Railway is without funds or unmortgaged assets with which to pay said indebtedness to Petitioner, but has the claim against the Company next referred to which is sufficient to discharge said indebtedness; that Sacramento Northern Railway's supposed claim against the Company is one based upon what is asserted to be the right of Sacramento Northern Railway to have a retroactive readjustment made of the divisions of rates on the business that has been interchanged between the Company and Sacramento Northern Railway for an indefinite period in the past commencing many years prior to the filing of the petition for reorganization herein on August 2, 1935, and, based thereon, a reallocation of the revenues on such business to Sacramento Northern Railway, because, so Petitioner avers, these divisions have resulted in a loss to Sacramento Northern Railway; that Petitioner, as a creditor of Sacramento Northern Railway, is entitled to reach in equity such alleged claim in order to satisfy the asserted indebtedness of Sacramento Northern Railway to Petitioner; that for that purpose Peti-

tioner asserts the right to bring a derivative action against the Company on behalf of said Sacramento Northern Railway to realize upon said alleged claim; that such alleged claim is entitled to priority over the mortgages of the Company and therefore was not barred or discharged by the prior orders of this Court barring and discharging unsecured claims against the Company existing on or before December 28, 1944; that the injunctive provisions of said Final Order were not intended to inhibit or bar the bringing of such an action, but, because of the breadth of said injunctive provisions, Petitioner is unwilling to bring such an action until said Final Order is clarified or modified so as to permit the institution by Petitioner of such derivative action.

2. Petitioner's petition divides the alleged claim of the Sacramento Northern Railway into the following three periods: (a) the period since December 28, 1944, when the railroad and other properties of the Company were returned to and revested in it, such period being referred to in the petition as "the post reorganization period"; (b) that part of the reorganization period from the beginning of reorganization on August 2, 1935 to December 28, 1944, referred to in the petition as "the full period of judicial operation"; and (c) the pre-reorganization period prior to August 2, 1935. Petitioner cannot be here concerned with any claim arising from interline accounts or rate divisions for any period after December 28, 1944, viz., "the post reorganization period." On that date the Company's railroad

properties were revested in the Company as reorganized, and since that date the Company, for its own account and entirely independently of the bankruptcy court, participated in and maintained divisions of rates and interline account practices. Over those division of rates and interline account practices the bankruptcy court neither had nor undertook to exercise any jurisdiction whatever. Petitioner therefore does not present, nor can there be presented, any reason why this Court should take any action with respect to Petitioner's claim insofar as it relates to any period subsequent to December 28, 1944.

3. As to the period prior to December 28, 1944, the request of the Petitioner should be denied for several reasons, the first of which is the principle of *res judicata*. In this behalf the Company alleges that insofar as Petitioner seeks a "clarification" of said Final Order for the purpose of permitting said derivative action, Petitioner is simply seeking an interpretation or construction of the provisions of said Final Order which will not inhibit or bar the bringing of said action. Petitioner's claim to precisely this relief has heretofore been presented to and determined by this Court in the above entitled proceeding. This Court has, by its order herein dated March 19, 1947 and entered on March 20, 1947, determined said issue adversely to Petitioner. No appeal was taken from said last mentioned order nor has it been modified or set aside, but has long since become final. Said order is *res judicata* of said claim of Petitioner. In this behalf the Company alleges that—

(a) On the 24th day of August, 1946 Petitioner commenced in the District Court of the United States for the Northern District of California, Southern Division, action numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants", a copy of the bill of complaint in which action, marked "Exhibit A", is attached hereto and is hereby incorporated herein and made a part hereof. Said action was a derivative action by Petitioner in the alleged right of Sacramento Northern Railway and asserted precisely the same claim that Petitioner's present petition herein now seeks leave to assert for a retroactive readjustment of the divisions between the Company and Sacramento Northern Railway and, based thereon, a reallocation of revenues to Sacramento Northern Railway on business originating on its lines and interchanged with the Company.

(b) On August 30, 1946 the Company filed its petition in the above entitled proceeding for an order requiring Petitioner to show cause why it should not be adjudged in contempt of this Court for disobeying said Final Order by bringing said action numbered 26333-H. A copy of said petition for an order to show cause, marked "Exhibit B", is attached hereto and is hereby incorporated herein and made a part hereof. Pursuant to said petition

therefor this Court on August 30, 1946 issued its order requiring Petitioner to show cause, a copy of which order, marked "Exhibit C," is attached hereto and is hereby incorporated herein and made a part hereof.

(c) On September 23, 1946 Petitioner filed its Answer and Return to said petition and order to show cause, a copy of which answer and return, marked "Exhibit D," is annexed hereto and is hereby incorporated herein and made a part hereof.

(d) On October 2, 1946 the Company filed its Reply to said answer and return of the Petitioner, a copy of which reply, marked "Exhibit E," is attached hereto and is hereby incorporated herein and made a part hereof.

(e) After proceedings duly and regularly had upon said petition for an order to show cause, Petitioner's said answer and return thereto and said reply of the Company, this Court made its order herein dated March 19, 1947 and filed March 20, 1947 determining and adjudging that the claim asserted by Petitioner in behalf of Sacramento Northern Railway in said action numbered 26333-H was released and discharged by said Final Order and that the assertion of said claim was barred and enjoined by said Final Order and that in commencing and maintaining said action numbered 26333-H Petitioner was guilty of contempt of this Court in disobeying said Final Order. A copy of said order dated March 19, 1947, marked "Exhibit F," is annexed hereto and is hereby incorporated herein and made a part hereof. No appeal was taken from said order dated March 19, 1947, nor has the same been



modified or set aside, but the same is now final and in full force and effect. To purge itself of said contempt Petitioner dismissed said action numbered 26333-H as to the Company, and a copy of said dismissal, marked "Exhibit G," is annexed hereto and is hereby incorporated herein and made a part hereof.

(f) Said order dated March 19, 1947 is a final and conclusive determination, binding upon Petitioner, that its asserted claim in behalf of Sacramento Northern Railway has been released and discharged, and that the assertion thereof is enjoined, by said Final Order. Said Order dated March 19, 1947 is res judicata of the issue now attempted to be asserted by Petitioner for a "clarification" of said Final Order.

### THIRD DEFENSE

#### Petitioner's Petition Fails to State Any Ground for Modifying Said Final Order.

As a further answer and return to Petitioner's said petition the Company respectfully shows:

1. Petitioner's petition herein requests a modification of the injunctive provisions of said Final Order so as to permit Petitioner to bring a derivative action on the same alleged claim as that asserted in said action No. 26333-H. The ground now asserted as warranting a modification of said Final Order is that the alleged claim of Sacramento Northern Railway to a retroactive readjustment of divisions is a claim upon an interline settlement or account which had priority over the mortgages

of the Company and therefore was not cut off by the Plan of Reorganization or by the former orders of this Court and accordingly survived the reorganization and that the assertion of such claim was not intended to be interdicted by the Final Order, though the injunctive provisions of the Final Order were drawn so broadly as to bar such claims, wherefore Petitioner is unwilling to risk citation for contempt in bringing its proposed derivative action unless and until the Final Order shall be modified.

2. This contention has already been determined adversely to Petitioner by said order herein dated March 19, 1947, Exhibit F hereto, which is conclusive and binding upon Petitioner and is *res judicata* of this issue.

3. As stated under the Second Defense, the derivative action which Petitioner seeks leave to bring involves the assertion of the identical claim as the one asserted in said action numbered 26333-H. By said order dated March 19, 1947 this Court found and determined that the claim asserted in said action numbered 26333-H was "released and discharged by said Final Order." Entirely aside from the injunctive provisions of said Final Order, it has conclusively been determined as against Petitioner that the claim which Petitioner asks leave to assert "has been released and discharged." That Petitioner has no such claim as the one that it now seeks to assert is therefore determined and the matter is *res judicata*.

4. It having already been finally and conclusively determined that the claim Petitioner seeks

to assert has been released and discharged, Petitioner's petition does not and cannot state any ground for modifying the injunctive provisions of said Final Order to permit the assertion of such claim.

5. Said Final Order does, and was intended to, bar and enjoin the assertion of claims that had been released and discharged by the orders of this Court and accordingly no ground for modifying said Final Order has been shown.

#### FOURTH DEFENSE

The Petitioner Has No Standing to Assert Claims of Sacramento Northern Railway.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. Petitioner's claim depends upon an alleged indebtedness owing from Sacramento Northern Railway to Petitioner which arose in 1928. Sacramento Northern Railway and the Company each contends that this claim is barred by the Statute of Limitations. Petitioner thus far has done no more than to assert its claims; the defenses of Sacramento Northern Railway to the claim have not been tried; Petitioner has not obtained judgment; nor has Petitioner attempted unsuccessfully to satisfy any judgment which it might obtain. Under well-settled doctrines of creditor's rights, Petitioner in these circumstances has no standing to assert, speak for or to be in any way concerned with the claims, if any, which Sacramento Northern Railway

may have on its part against the Company or any other person.

2. Unless and until Petitioner shall obtain a judgment against Sacramento Northern Railway and a return of execution on that judgment unsatisfied, Petitioner's application to this Court is premature.

### FIFTH DEFENSE

This Court Has No Jurisdiction to Modify the Final Order as Requested by Petitioner.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. By said Final Order the above entitled reorganization proceeding was terminated and the case was closed. No jurisdiction was reserved by the Court to modify the injunctive provisions of the Final Order to permit suit or action upon claims the assertion of which had been enjoined. The Court is accordingly without jurisdiction to grant the relief prayed for in Petitioner's petition. The case has not been reopened and no ground for reopening the case is attempted to be asserted. Nor, in view of the Court's order of March 19, 1947 determining that Petitioner's claim was released and discharged by the Final Order, can a case for reopening the above entitled proceeding be stated. Reopening is allowed only when the Court has power to grant the ultimate relief sought and here the ultimate relief is barred because the prior orders of the Court are *res judicata* of Petitioner's present claim.

Therefore, no case for reopening the reorganization proceeding can be stated.

2. This Court determined on March 19, 1947, that the assertion by Petitioner of its claims is enjoined by the Final Order. That order of March 19, 1947, constituted a full, complete and final determination of the meaning of the Final Order. This Court has no power to modify the terms of the Final Order as requested by Petitioner. A petition for an order terminating the reorganization proceeding was filed in this Court on March 18, 1946. This Court directed that a hearing on that petition take place on March 28, 1946, and that notice of the hearing be given to all parties to the reorganization, including the Petitioner. Notice was given as ordered. The hearing was held and the Final Order signed and filed on March 28, 1946. It was served on Petitioner as a party to the reorganization proceeding. Petitioner took no appeal from the order, and therefore may not now seek a modification of that order as requested by the petition herein.

### SIXTH DEFENSE

The Petition Is Without Equity. This Court, If It Had Jurisdiction to Modify the Final Order, Should Not Exercise That Jurisdiction.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. As of December 29, 1944 the Plan of Reorganization in the above entitled proceeding was consummated, the Company's railroad and other prop-



erties were returned to and revested in it for operation by the reorganized company and thereupon the new securities of the Company, both bonds and stock, were issued pursuant to the Plan and since that time said bonds and stock have been freely traded in and many thereof have changed hands, and many new rights and interests have been acquired,—all in reliance upon the Plan as consummated and the former orders of this Court with respect thereto as determining and settling the rights of the parties and upon the basis that claims such as the one attempted to be asserted by Petitioner had been released and discharged and would not participate in the assets nor constitute a liability of the Company. This Court, by its Final Order entered in this proceeding on March 28, 1946, found, *inter alia*, that the Plan of Reorganization had been fully and properly carried out and put into effect, that all acts and things required by the Court's order of November 27, 1944, in order to consummate the Plan had been properly done or performed and that "the exchange of more than 99% of the principal amount of securities of the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities." Petitioner was a party to the above entitled proceeding and had full opportunity to present its present claim therein but failed to do so. It would be unjust and inequitable, even if the Court had jurisdiction to do so, to

modify its prior orders so as to permit the belated assertion of this claim by Petitioner, to the detriment of those who acquired their rights and interests on the faith of the Plan and the prior orders of this Court. The petition is wholly without equity.

2. The divisions of rates between Sacramento Northern Railway and the Company were established at a time when Petitioner, as the owner of all the stock of the Company, had control over all activities of the Company and Sacramento Northern Railway, including divisions of rates established between them. Petitioner having had control over said divisions of rates cannot now be heard to complain of them. Petitioner for many years prior to the reorganization and at all times during the reorganization was fully familiar with the divisions of rates of which it now purports to complain. Neither prior to nor during the reorganization did Petitioner in any way question such divisions of rates. Under these circumstances Petitioner's request must be denied for laches.

3. Petitioner was an active party in the reorganization proceeding, throughout the entire period of reorganization. The claim that Petitioner now seeks to assert existed (if it ever existed at all) during the reorganization proceeding and could and should have been filed and asserted in and during the pendency of the proceeding, so that this Court, with all of the interested parties before it and before approving and thereafter confirming the Plan and making the Final Order, could have determined whether any claim, such as that now attempted to

be asserted, existed and, if it did exist, what its priority should be and whether, and how, it should share in the distributable assets in the hands of the Court. Petitioner failed and neglected to file said claim, to assert the same or in any way to make the same known. Having failed to file or assert its alleged claim prior to the Final Order, Petitioner may not now have the Final Order modified so as to permit it now to assert said claim.

Wherefore, the Company prays that Petitioner take nothing by its petition, that said petition be dismissed and that the Company have such other and further relief as may be appropriate in the premises.

/s/ ALLAN P. MATTHEW,  
ROBERT L. LIPMAN,

/s/ BURNHAM ENERSON,

Attorneys for the Western Pacific Railroad  
Company.

Of Counsel:

McCUTCHEON, THOMAS, MATTHEW,  
GRIFFITHS & GREENE.

State of California,

City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Company. That he has read the foregoing Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modifi-

cation of the Injunctive Provisions of the Final Order Herein, dated March 28, 1946, and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters that he believes to be true.

s/ CHARLES ELSEY.

Subscribed and sworn to before me this 13th day of September, 1948.

(Seal)      /s/ NANCY EVERETT,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires November 3, 1950.

[Endorsed]: Filed Sept. 15, 1948.

EXHIBIT G

In the District Court of the United States for the  
Northern District of California,  
Southern Division  
No. 26333-H

The Western Pacific Railroad Corporation,  
vs. Plaintiff,

Sacramento Northern Railway, The Western Pacific  
Railroad Company and American Trust Com-  
pany of San Francisco, as Trustees under an  
Indenture executed by Sacramento Northern  
Railroad as of July 1, 1918, Defendants.

NOTICE OF DISMISSAL

To the Defendants herein and to their Attorneys:

Please take notice that in accordance with the  
provisions of that certain order adjudging the  
Western Pacific Railroad Corporation guilty of  
contempt, made on March 19, 1947, and filed March  
20, 1947 in an action numbered 26591-S in the  
above entitled Court, and in conformity to para-  
graph 3 of said order, the above entitled action is  
hereby dismissed as to the defendant The Western  
Pacific Railroad Company.

Dated: April 18, 1947.

LEROY R. GOODRICH,  
F. C. NICODEMUS, JR.,  
A. PERRY OSBORN,

Attorneys for The Western Pacific Railroad Cor-  
poration.

By LEROY R. GOODRICH.

[Endorsed]: Filed Sept. 15, 1948.





LEROY R. GOODRICH  
Bank of America Building  
Oakland 12, California  
Attorney for The Western Pacific  
Railroad Corporation

FRANK C. NICODEMUS, JR.  
44 Wall Street  
New York 5, New York

A. PERRY OSBORN  
20 Exchange Place  
New York 5, New York  
*Of Counsel*

IN THE  
**District Court of the United States**  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

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**No. 26591-S**

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IN THE MATTER  
*of*  
THE WESTERN PACIFIC RAILROAD COMPANY,  
*Debtor.*

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**MEMORANDUM OF THE WESTERN PACIFIC RAIL-  
ROAD CORPORATION IN SUPPORT OF PETITION  
FOR CLARIFICATION OR MODIFICATION OF THE  
INJUNCTIVE PROVISIONS OF THE FINAL ORDER  
HEREIN DATED MARCH 28, 1946**

The objective of the Petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the Final Order entered by

this Court on March 28, 1946, is to put the Petitioner in a position to file under protection of a Court Order an amended Bill of Complaint in a proceeding pending numbered 26333-H on the Docket of this Court originally brought by the Petitioner against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, in respect of an indebtedness due the Petitioner from the defendant Sacramento Northern Railway amounting with interest to June 30, 1945, to \$1,441,390.55.

A form of Order which the Petitioner deems appropriate is made a part hereof marked Attachment A.

The form of amended Bill of Complaint under which it is proposed again to bring into the action as a party defendant The Western Pacific Railroad Company (heretofore dismissed under conditions fully developed in this Memorandum), is made a part hereof marked Attachment B.

The Western Pacific Railroad Company has filed in opposition an "Answer and Return" setting up six *Defenses* which appear in the main to relate to the merits of the controversy ultimately to be determined. That stage, however, has not yet been reached.

We think a brief explanation of what has already happened and what the Petitioner now proposes to do will satisfy the Court that the Petitioner is reasonably entitled to ask its aid and protection in the prosecution of its claim against both the Sacramento Northern Railway and its parent The Western Pacific Railroad Company.

On August 30, 1946, after the filing of the original Bill of Complaint in number 26333-H in which The Western Pacific Railroad Company was named as a party Defendant Judge ST. SURE on application of The Western Pacific Rail-

road Company issued an Order directing the present Petitioner to show cause why it should not be adjudged in contempt of Court. The Petitioner filed its Return to the Order to Show Cause and the matter was submitted to Judge ST. SURE and had been held by him undecided for many months when he was stricken with the illness which resulted in his retirement.

On March 19, 1947, an Order was signed by Judge ST. SURE at his residence and was sent over to the Clerk of the Court for filing which adjudged the Petitioner to be in contempt; imposed as a penalty that the Petitioner pay to The Western Pacific Railroad Company "the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company on account of the commencing and maintaining of said action No. 26333-H against it" and granted to the Petitioner the privilege of purging itself of such contempt by dismissing within fifteen days as against The Western Pacific Railroad Company its said action No. 26333-H.

From the recitals in the Order signed by Judge ST. SURE on March 19, 1947, it seemed obvious to Petitioner's counsel that he had misconceived the nature of the cause of action set forth in the Bill of Complaint in Action No. 26333-H, which had been carefully limited to be confined within the exceptive provisions of the Order of March 28, 1946, permitting commencement and maintenance of a suit against The Western Pacific Railroad Company on *any* claim entitled to priority over its pre-reorganization mortgages.

In this situation any one of three procedures was open to Petitioner—(a) a Petition for Rehearing before Judge ST. SURE; (b) an appeal to the Circuit Court of Appeals; or (c) a dismissal of the Bill of Complaint as against The Western Pacific Railroad Company to be followed by the filing of an amended Bill of Complaint under the protection of an Order of Court.

Counsel for the Petitioner were confident that Judge ST. SURE would recognize that he had misconceived the case and would promptly set aside the Order on a Petition for Rehearing but that course was ruled out by his illness.

There was a patent hazard in an appeal to the Circuit Court of Appeals. If such an appeal had been taken and lost the Petitioner might become liable for heavy counsel fees to be charged by counsel for The Western Pacific Railroad Company on the theory that they had rid it of a liability of \$1,441,390.55.

So the Petitioner determined to dismiss the original Bill of Complaint as against The Western Pacific Railroad Company and thereafter to apply (as it is now doing) for a clarifying or modifying Order under the protection of which it could reimplead The Western Pacific Railroad Company under a new Bill of Complaint revised so as to be more clearly and definitely confined within limits of the exceptive provisions of the Order of March 28, 1946, and amended by superadding a derivative action in favor of the Sacramento Northern Railway and against The Western Pacific Railroad Company which if successful would put Sacramento Northern Railway in funds necessary to discharge its indebtedness due the Petitioner.

It is the Petitioner's belief that the commencement and maintenance of such a suit would violate neither the spirit nor the letter of the injunctive provisions of the Order of March 28, 1946, but even if it should be found to run counter in some detail to the letter of such provisions that the Court in furtherance of justice would favorably consider a motion for an order limiting or suspending its application.

We pass over at this point without discussion the suggestion of counsel for The Western Pacific Railroad Company that this Court has lost control over the Order of March 28, 1946, and has no power to clarify it or limit its application. As an incident to its power to enforce the



injunction we contend that there is inherent power to limit its application.

For obvious reasons we think that the Court will be interested in knowing what the suit is which the plaintiff proposes to maintain and to prosecute and in which it intends to re-implead The Western Pacific Railroad Company.

First of all it should be emphasized that there is an undisputed and highly meritorious claim against the Sacramento Northern Railway for \$1,441,390.55.

The Sacramento Northern Railway is a wholly-owned subsidiary of The Western Pacific Railroad Company and it (said Railroad Company) asserts that the claim is barred by the Statute of Limitations of the State of California. The precise Statute upon which The Western Pacific Railroad Company relies is not cited but we assume that reliance is placed upon Section 337 of the Code of Civil Procedure of California which bars suit upon an open book account after four years. In order to determine whether limitation is a good defense it is necessary to give very briefly the history of the indebtedness.

The Petition alleges:

“In or about 1928 the Sacramento Northern Railway acquired lines of railroad from or of the San Francisco-Sacramento Railroad Company for the purpose of extending the traffic producing territories from which its parent, said Western Pacific Railroad Company would derive additional long haul revenue producing traffic. By this means additional areas were opened up to said Western Pacific Railroad Company in Alameda, Contra Costa, Solano, Yolo and Sacramento Counties, at a total cost of \$1,675,000 of which the principal indebtedness due the Petitioner from Sacramento Northern Railway is or represents a part.”

At the outset it is to be noted therefore that the indebtedness which the Petitioner is seeking to collect represents

the unpaid purchase price in corporate title of valuable traffic producing property which has been continuously in the possession of, and has been operated for the benefit and enrichment of (a) the pre-reorganization The Western Pacific Railroad Company; (b) the Section 77 Trustees; and (c) the post-reorganization Railroad Company but for which the Petitioner has not been paid.

This being true the case is controlled in all of its fundamental features by the decision of the Supreme Court of California in the case of *Booth v. Hoskins*, 75 Cal. 271.

This was a suit brought in Placer County, California, to quiet plaintiff's alleged title to land. The defendant answered alleging a valid conveyance of the property to him by the plaintiff for a consideration of \$408 and prayed that his title be quieted against the wrongful claim of the plaintiff. The plaintiff answered the cross-complaint admitting conveyance of the land to the defendant by quit claim deed but rejoined that the conveyance was intended only as a mortgage to secure payment of \$408 advanced to him by the defendant and then further alleged that the defendant's claim against him for the said sum of \$408 (with interest accruals bringing the total up to slightly less than \$1,000) was barred by Sections 337 and 339 of the Code of Civil Procedure.

The Court held:

(a) that the quit claim deed was in fact given as security for the debt and was not an absolute or unconditional conveyance;

(b) that the debt which it was given to secure was barred by Sections 337 and 339 of the Code of Civil Procedure and that no writing conforming to Section 360 had been given to toll limitations.

The Court then held, and the Supreme Court of California affirmed the holding, that equity would not give the

plaintiff any relief unless and until he had paid the barred debt.

The following is from the Opinion of the Supreme Court:

“The whole case shows that Booth justly owed the defendant all the money claimed by him. It was by the use of the money loaned by defendant that Booth acquired the title to his property now of large value. Common honesty requires a debtor to pay his just debts if he is able to do so, and the Courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the Statute of Limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is, as suggested by the Court below, that he who seeks equity must do equity. In accordance with this maxim we think the plaintiff should be denied any affirmative relief until the money justly due to the defendant is paid.”

This decision is of importance in this case not so much in its relation to the question of limitations (because we shall show that adequate writings conforming to Section 360 of the California Code of Civil Procedure have been given to toll limitations) but is highly significant in its direct bearing on the moral issues in this case. If the reorganized The Western Pacific Railroad Company is to be allowed to retain proprietorship of Sacramento Northern Railway to swell its own revenues and improve its own earning power we think as the Court here says that “common honesty” requires that it make good the unpaid purchase price. Certainly this Court would hesitate to allow an injunction granted by it for a perfectly proper purpose to be used to frustrate and defeat what the Supreme Court of California deems to be “common honesty”.

It is also important for this Court to understand the form of The Western Pacific Railroad Company's ownership of the Sacramento Northern Railway.

At the time the indebtedness was created to aid the purchase of the properties of the San Francisco-Sacramento Railroad Company by the Sacramento Northern Railway all of the capital stock and all but a negligible amount of the outstanding bonds of the Sacramento Northern Railway were owned by the pre-reorganization The Western Pacific Railroad Company. To be specific there were 10,000 shares of Common Stock (\$1,000,000) and \$5,213,475 of First Mortgage Bonds. Subsequently money was advanced by the parent to the subsidiary amounting as of December 31, 1945 to \$4,524,744. These securities were revested in the reorganized The Western Pacific Railroad Company by Order of this Court entered November 27, 1944 but are obviously held by the reorganized The Western Pacific Railroad Company subject to all of the infirmities and equities that could have been asserted against the pre-reorganized Railroad Company. That is to say—the reorganized The Western Pacific Railroad Company took these securities in precisely the condition and subject to all equities of third parties under which they were held by the pre-reorganization Railroad Company. The Court could not well revest in the reorganized Western Pacific Railroad Company a better and stronger title than that of the pre-reorganized Company. To do so would defy the natural law that a stream does not rise higher than its source.

So we respectfully urge that the Petitioner without violating the intent and purposes of the injunctive provisions of the Order of March 28, 1946, is entitled to bring any action that could have been brought against the pre-organized The Western Pacific Railroad Company respecting the Sacramento Northern Railway; and if such a suit is prohibited by the letter of the injunctive provision of the Order of March 28, 1946, we believe that it is not only within the power of this Court but will be the wish of this Court to modify the Order to conform to its true intent.

First as to the enforceability of the indebtedness due the Petitioner from the Sacramento Northern Railway which the Western Pacific Railroad Company alleges is barred by limitations:

On or about February 14, 1933, Sacramento Northern Railway filed with The Railroad Credit Corporation to induce it to make a loan to the pre-organized The Western Pacific Railroad Company a certificate verified by its Auditor certifying that: "There is now owing to The Western Pacific Railroad Corporation from Sacramento Northern Railway the sum of \$856,260 in an open book account." From time to time thereafter the Sacramento Northern Railway filed or caused to be filed in each year up to and including at least the year 1944 with the Interstate Commerce and with the federal Commissioner of Internal Revenue properly authenticated financial statements in which said indebtedness was shown as subsisting indebtedness and upon which interest accruals were made in favor of the Petitioner.

For these reasons, among others, the Petitioner maintains that the debt is valid and subsisting, is not barred by limitation, and that the Petitioner is entitled to a peremptory decree for the full debt with interest which amounted as of June 30, 1945 to \$1,444,390.55.

Such a judgment will, however, be uncollectible unless payment can be obtained through a sale of the railroad and property of Sacramento Northern Railway or through the derivative action in favor of Sacramento Northern Railway against The Western Pacific Railroad Company.

The Petitioner believes that it can collect and should be permitted by this Court to collect its debt from The Western Pacific Railroad Company by one or the other of these two procedures in their reverse order—*first*, by super-adding to the present Bill of Complaint in Action No. 26333-H a derivative cause of action as outlined in the



Petition involving a retroactive adjustment of divisions of revenues interchanged between Sacramento Northern Railway and The Western Pacific Railroad Company and its Trustee and *second*, by a sale of the property of the Sacramento Northern Railway pursuant to a decree which under the Deep Rock doctrine would subordinate to the Petitioner's claim for \$1,441,309.55 *all* indebtedness of the Sacramento Northern Railway held by The Western Pacific Railroad Company.

By one or the other of these two procedures the Petitioner hopes to coerce The Western Pacific Railroad Company into doing what the Supreme Court of California says is required by the dictates of common honesty but the Petitioner feels that it ought not unnecessarily to disrupt the present operation of Sacramento Northern Railway as an integral part of the Western Pacific Railroad System and hence should defer action for a receivership and sale unless and until it has exhausted the other remedy without securing a full recovery.

We do not think we are called upon now to discuss the merits of either of these propositions. The effort of our adversaries to do just this is one of the grounds of our own criticism of their "Answer and Return." All that we think we are called on to do in order to make a case for the preliminary relief here sought is to show a *bona fide* claim and a probable cause of action. Although we are fighting against strongly entrenched adversaries we do think that we have shown a *bona fide* claim and to say the very least a probable cause of action.

A few comments on the "Answer and Return" of The Western Pacific Railroad Company may be helpful.

(a) *Limitations*. Little more need be said on limitations. We think that adequate writings are available to show effective recognition of the debt within the four year period. But even if the debt is barred against Sacramento Northern Railway it is a good claim against proceeds of

sale of the properties of the Sacramento Northern Railway in priority to the claims thereagainst of The Western Pacific Railroad Company unless we misinterpret *Booth v. Hoskins*.

(b) *Res Adjudicata*. The Petition pre-supposes that the injunctive provisions of the Order of March 28, 1946, were broad enough to bar the prosecution as against The Western Pacific Railroad Company of the suit as framed in the original Bill of Complaint in No. 26333-H. But that does not bar an application to the Court for a revision of the terms of the injunction to prevent an injustice. Nor does the doctrine of *res adjudicata* apply if there is an amended Bill of Complaint filed of a different character. The Court will note that there appears in the proposed amended Bill of Complaint the following paragraph not included in the original Bill of Complaint:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.”

(c) *Inter-Line Accounts*. We are in complete disagreement with what is said by counsel for The Western Pacific

Railroad Company on the subject of inter-line accounts and inter-line settlements. There has been no judicial settlement. The accounts are open for audit and there is no question of limitations. Under the present Rule 170 prescribed by the Accounting Division of the Association of American Railroads all inter-line accounts are open for voluntary audit for a period of three years, the period having been reduced from six years to three years by reason of man shortage occasioned by the war; but there is no limitation at all upon the right of any connecting carrier to a judicial settlement of inter-line accounts back to the last preceding settlement. To say that the inter-line accounts between the Sacramento Northern Railway and The Western Pacific Railroad Company or its Trustees are settled and closed is contrary to the facts as we understand them. The whole subject of the auditing and settlement of inter-line carrier accounts was rather fully developed and its peculiarities explained in evidence taken by the Committee of Interstate Commerce (Wheeler-Truman Sub-Committee) pursuant to Senate Resolution 71 (74th Congress) pages 9944-9964.

(d) *Alleged failure first to secure a judgment.* The Western Pacific Railroad Company asserts that the Petitioner has no right to bring a derivative action on behalf of Sacramento Northern Railway because it has not yet obtained a judgment. We admit that to be the general rule but like all general rules it should not be applied to cases to which the reasons underlying it have no relevancy.

There being no defense other than Limitations (which may be disposed of summarily) to the Petitioner's claim in the amount of \$1,441,390.55 an immediate judgment or decree is available to the Petitioner under Rule 56 of the Rules of Civil Procedure. Since equity regards as done that which ought to be done we think it proper for the Court to assume for the purposes of the present Petition that the Petitioner has the status of a judgment-creditor.

(e) *Alleged lack of equity.* As the last of its six defenses The Western Pacific Railroad Company avers that the Petitioner's Petition is without equity and should be denied even if the Court has jurisdiction (which is questioned in the fifth defense) to limit or relax the injunctive provisions of its final Order of March 28, 1946.

The point is urged that such action by the Court would disturb the reorganization upon the faith of which the new securities have been taken and sold and for a long period of time have acquired a standing in financial and investment circles on the faith of the Court's final Order of March 28, 1946.

The fact is overlooked, however, that the reorganized The Western Pacific Railroad Company did not acquire under the reorganization title to the properties of the Sacramento Northern Railway but only the capital stock and certain of the indebtedness of the Sacramento Northern Railway and there was no representation, express or implied, that these securities would enjoy a different status in the ownership of the reorganized The Western Pacific Railroad Company than in the ownership of the pre-reorganization The Western Pacific Railroad Company. The reorganized The Western Pacific Railroad Company took these securities subject to all equities that might have been asserted thereagainst in the ownership of the pre-reorganization The Western Pacific Railroad Company, and we respectfully insist that the Bankruptcy Court did not have power to enter and did not attempt to enter an injunction that would impair such equities or would interdict the joining of The Western Pacific Railroad Company as a party defendant to any action against Sacramento Northern Railway in respect of such equities to which The Western Pacific Railroad Company may be deemed a necessary or proper party. It is to be borne in mind that the Sacramento Northern Railway was not a

party to the Bankruptcy proceeding and that the Bankruptcy Court had no jurisdiction to make any determination respecting the Status of the indebtedness due from it to the Petitioner. (Note in this connection what is said by Mr. Justice REED under "Accommodation Collateral" in his opinion in this proceeding—*Ecker v. Western Pacific Railroad Corporation*, 318 U. S. 448.)

All of which is respectfully submitted.

LEROY R. GOODRICH,  
Bank of America Building,  
Oakland 12, California,  
*Attorney for The Western Pacific  
Railroad Corporation.*

FRANK C. NICODEMUS, JR.,  
A. PERRY OSBORN,  
*Of Counsel.*



**Attachment A**

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

No. 26591-S

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IN THE MATTER

*of*

THE WESTERN PACIFIC RAILROAD COMPANY,  
*Debtor.*

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**SUPPLEMENT TO FINAL ORDER**

The Petition filed herein September 30, 1947, by The Western Pacific Railroad Corporation for a supplemental Order clarifying or modifying the injunctive provisions of the Final Order herein dated March 28, 1946, came on for hearing under the jurisdiction reserved by the Court under said Final Order and general equity jurisdiction conferred by the National Bankruptcy Act and after hearing has been submitted—

The Court finds and concludes:

FIRST: That the Petitioner is a creditor of Sacramento Northern Railway in an amount as shown by the General Balance Sheet of said Railway at June 30, 1945, of \$1,441,390.55.

*Attachment A*

SECOND: The Sacramento Northern Railway is not now and never has been a party to the Bankruptcy proceeding and the Petitioner has filed in this Court and there is now pending herein an independent suit against Sacramento Northern Railway and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, to enforce payment of said indebtedness against Sacramento Northern Railway and its property. In the original Bill of Complaint The Western Pacific Railroad Company was named as a party defendant but was dismissed as such defendant by the Petitioner following the entry of an Order adjudging that the filing of said Bill of Complaint against The Western Pacific Railroad Company violated the injunctive provisions of said Final Order.

THIRD: The Petitioner proposes now to institute a new suit or to reform the pending suit by re-impleading The Western Pacific Railroad Company under a new or amended complaint setting forth in the right of Sacramento Northern Railway, a derivative cause of action against The Western Pacific Railroad Company for a judicial settlement of interline accounts under which substantial recoveries may be obtained by Sacramento Northern Railway to apply in satisfaction of its indebtedness due the Petitioner.

FOURTH: The Petitioner represents that the new or amended Bill of Complaint will set forth valid and subsisting causes of action against Sacramento Northern Railway and The Western Pacific Railroad Company which violate neither the spirit nor the letter of the injunctive provisions of said Final Order but even if within the letter are not within the intent of said Final Order and that a supplement Order limiting its application would be in furtherance of justice.

*Attachment A*

FIFTH: Substantial issues of law and fact which were not before this Court in this Bankruptcy proceeding are tendered by the Petitioner which may be meritorious and even though within the letter of the injunctive provisions of the Final Order may not be within the spirit and intent and ought not to be disposed of summarily.

Now, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That notwithstanding the injunctive provisions of the Final Order dated March 28, 1946, authority is hereby granted to the Petitioner (and if and to the extent necessary said provisions are hereby modified) to implead The Western Pacific Railroad Company as an additional party defendant in the action now pending in this Court numbered 26333-H on the Docket and to file in said action and serve upon The Western Pacific Railroad Company such amended Bill of Complaint as it may be advised by counsel is necessary and proper in order to set forth the causes of action outlined in the petition.

2. That the authority hereby granted is subject to the condition that it is without prejudice to the positions of either The Western Pacific Railroad Company or the Petitioner if said Final Order or any earlier order or decree of this Court in this Bankruptcy proceeding is pleaded by said Railway Company in bar of the prosecution of any action or actions set forth in such amended Bill of Complaint.

Dated, \_\_\_\_\_, 1948.

.....  
District Judge



## Attachment B

LEROY R. GOODRICH  
Attorney for Plaintiff  
Bank of America Building,  
Oakland 12, California

F. C. NICODEMUS, JR.  
A. PERRY OSBORN  
*Of Counsel*

IN THE  
**District Court of the United States**  
FOR THE NORTHERN DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION

---

**26333-H**

---

THE WESTERN PACIFIC RAILROAD CORPORATION,  
*Plaintiff,*

*vs.*

SACRAMENTO NORTHERN RAILWAY, THE WESTERN PACIFIC  
RAILROAD COMPANY and AMERICAN TRUST COMPANY OF  
SAN FRANCISCO, as Trustee under an Indenture executed by  
Sacramento Northern Railroad as of July 1,  
1918,

*Defendants.*

## AMENDED BILL OF COMPLAINT



IN THE  
**District Court of the United States**

FOR THE NORTHERN DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION

---

**26333-H**

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THE WESTERN PACIFIC RAILROAD CORPORATION,  
*Plaintiff,*

*vs.*

SACRAMENTO NORTHERN RAILWAY, THE WESTERN PACIFIC  
RAILROAD COMPANY and AMERICAN TRUST COMPANY OF  
SAN FRANCISCO, as Trustee under an Indenture exe-  
cuted by Sacramento Northern Railroad as of July 1,  
1918,

*Defendants.*

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AMENDED BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plaintiff  
herein, complaining of the above named defendants, re-  
spectfully shows:

I

That the plaintiff is a domestic corporation created by  
and existing under the laws of the State of Delaware.

II

That each of the defendants is a domestic corporation  
created by and existing under the laws of the State of  
California and is an inhabitant of the Northern District  
of California.

*Attachment B*

## III

That this is a civil action in equity between citizens of different States and to the extent that it seeks relief in favor of Sacramento Northern Railway against the defendant The Western Pacific Railroad Company it is a derivative action brought by the plaintiff as a creditor of Sacramento Northern Railway on behalf of itself and other creditors similarly situated; and that the amount in controversy exclusive of interest and costs exceeds the sum of \$5,000.

## IV

That in the year 1928 the plaintiff advanced to the defendant, Sacramento Northern Railway, sums of money aggregating \$877,380, of which \$21,120 was repaid January 31, 1929, leaving a balance due on said date of \$856,260, and in the period subsequent to said advances the defendant, Sacramento Northern Railway, has accrued interest thereon to a total of \$585,130.55, and said amounts aggregating \$1,441,390.55 are shown as indebtedness due the plaintiff on the General Balance Sheets of the defendant, Sacramento Northern Railway, as of June 30, 1945. That for a number of years within a period of four years next preceding the institution of this suit the defendant, Sacramento Northern Railway, has furnished to the plaintiff duly authenticated Balance Sheets signed by properly authorized accounting officers showing such indebtedness for principal and appropriate amounts for accrued interest thereon as valid and subsisting indebtedness due and owing from said defendant to the plaintiff and has authorized the plaintiff to file each such Balance Sheet on its behalf with Commissioner of Internal Revenue as the basis for the determination of federal taxes.

*Attachment B*

## V

That the aforesaid indebtedness due to the plaintiff by the defendant, Sacramento Northern Railway, in the amount of \$1,441,390.55 including interest to June 30, 1945 but not interest accruals thereafter was created and arose in the manner hereinafter stated and is entitled in equity to a first and paramount lien on the railways, property and assets of said defendant, Sacramento Northern Railway, and such indebtedness is entitled to be paid in full prior to any payment of or on account of indebtedness, if any, due and owing to the defendant, The Western Pacific Railroad Company, by the defendant, Sacramento Northern Railway.

## VI

That the defendant, The Western Pacific Railroad Company, now owns and operates, and at all times mentioned in this Bill of Complaint has owned and operated, a system of Railways in the States of California, Nevada and Utah, with termini at San Francisco, Oakland and Sacramento in the State of California, and Salt Lake City in the State of Utah. That during part of the period 1935 to 1945 its operations were conducted by Trustees appointed by this Court pursuant to provisions of The National Bankruptcy Act. That the properties of the defendant, The Western Pacific Railroad Company, were released to it by the said Trustees as of December 31, 1944 for corporate operation and such operation still continues. That prior to November 22, 1943, all of the capital stock of the defendant, The Western Pacific Railroad Company, was held by the plaintiff which had issued shares of its own stock thereagainst. That this arrangement was made for the reason that under certain provisions in the corporate law of California, since

*Attachment B*

revealed, there was a problem of stockholders' liability. That subsequent to November 22, 1943, but prior to December 31, 1944, the capital stock of the defendant, The Western Pacific Railroad Company, theretofore owned by the plaintiff, was delivered to the Reorganization Committee of the defendant, The Western Pacific Railroad Company, to facilitate its reorganization which was consummated as of said last mentioned date.

## VII

That in 1925, the defendant, The Western Pacific Railroad Company, acquired at a cost of approximately \$4,500,000 all of the capital stock and mortgage indebtedness of the Sacramento Northern Railway, one of the defendants herein, being 10,000 shares of common stock (\$100 par value) and \$5,224,373 mortgage bonds, which securities were purchased by the defendant, The Western Pacific Railroad Company, from the plaintiff and which securities the plaintiff at the request of said defendant, The Western Pacific Railroad Company, had acquired and held until such time as the defendant, The Western Pacific Railroad Company, could obtain from the Interstate Commerce Commission the necessary authority under the Interstate Commerce Act to control the defendant, Sacramento Northern Railway. That the interim ownership or control of said Sacramento Northern Railway by the plaintiff was an arrangement entered into at the request and for the convenience of the defendant, The Western Pacific Railroad Company, which desired to own and control said Sacramento Northern Railway for the purpose of securing access to valuable traffic in interchange originating in the Sacramento Valley. That the defendant, Sacramento Northern Railway, then owned and has continued to own

*Attachment B*

and operate an interurban electric railway engaged in transporting both passengers and freight located in the rich traffic producing territory of the Sacramento Valley extending from Sacramento to Chico, with branches to Oroville, Colusa, and Woodland, and a detached line running southwesterly from Vacaville. That authority has been granted to construct additional lines including a line approximately 16 miles in length extending southerly from a connection with the line of the San Francisco-Sacramento Railroad Company, hereinafter mentioned, at a point 7 or 8 miles south of Sacramento. That it is stated in the Report of the Interstate Commerce Commission authorizing the defendant, The Western Pacific Railroad Company, to acquire control of the defendant, Sacramento Northern Railway:

“As the Western Pacific will hold over 99% of the Railroad Company's Bonds, which constitute its funded debt, the value of the properties to the Western Pacific from the standpoint of earnings will be measured by the Railroad Company's gross income less miscellaneous deductions therefrom. Gross income so reduced has averaged \$292,780.43 for the period given and was \$168,335.63 in 1924. Besides the direct return which the record indicates the Western Pacific will receive as owner of the securities of the Railroad and the Railway Companies, it will also receive income because of additional traffic which will be delivered to it by the Railway Company and on which it will get its long haul to Salt Lake.”

That the plaintiff for further factual detail hereby refers to the official Report of the Interstate Commerce Commission from which the foregoing is quoted and which appears in 99 Interstate Commerce Commission Report at page 382 under title: “Finance Docket No. 1881—Proposed Control of Sacramento Northern By Western Pacific R. R.”



*Attachment B*

That the defendant, The Western Pacific Railroad Company, has duly reimbursed the plaintiff for all amounts provided by it prior to July 8, 1925 in the acquisition of control for its account of the defendant, Sacramento Northern Railway.

## VIII

That the acquisition by the defendant, The Western Pacific Railroad Company, of control of the defendant, Sacramento Northern Railway, had proved so advantageous and so profitable to the defendant, The Western Pacific Railroad Company, is the period July 8, 1925 to July 1, 1928, that it determined at or before said last mentioned date to broaden the enterprise and extend feeder lines further into the fertile areas of the Sacramento Valley by acquiring through its subsidiary the defendant, Sacramento Valley Railway, the lines of railway and other properties of the San Francisco-Sacramento Railroad Company, described in the Report of the Interstate Commerce Commission hereinafter mentioned as follows:

“(a) Extending from Oakland in a general easterly and northeasterly direction to Mallard, thence by barge and ferry across Suisun Bay, and continuing in a northeasterly direction to Sacramento; (b) from West Pittsburgh in an easterly direction to and through the city of Pittsburg; and (c) a line of railroad located on M Street in the city of Sacramento. The total mileage of main and branch line track to be acquired is 87.08 miles, in Alameda, Contra Costa, Solano, Yolo, and Sacramento Counties, Calif.”

That again, as in the case of the acquisition of control of the defendant, Sacramento Northern Railway, the plain-

*Attachment B*

tiff was requested to advance the funds necessary to secure control in the interim in which application for control by the defendant, The Western Pacific Railroad Company, was pending in the Interstate Commerce Commission. That to this end advances were made by the plaintiff which ultimately became part of the purchase price of the properties of the San Francisco-Sacramento Railroad Company which were acquired at a total cost of \$1,675,000 as of January 1, 1929 by the defendant, Sacramento Northern Railway, pursuant to authorization of the Interstate Commerce Commission granted October 15, 1928. That the plaintiff for further factual details hereby refers to the official Report of the Interstate Commerce Commission relating to such authorization which appears in 145 Interstate Commerce Commission Report, at page 533, under title: "Finance Docket No. 7060—Acquisition by Sacramento Northern Railway of Properties of San Francisco-Sacramento Railroad Company." That except the payment of \$21,120 made January 31, 1929, for which credit has been given, neither the defendant, The Western Pacific Railroad Company, nor its subsidiary, the defendant, Sacramento Northern Railway, has repaid to the plaintiff any part of the principal sum advanced by it to the defendant, Sacramento Northern Railway, and has paid to the plaintiff no part of the interest thereon regularly credited to the plaintiff on the books of the defendant, Sacramento Northern Railway, and the whole amount thereof shown on the books of the defendant, Sacramento Northern Railway, in the amount of \$1,441,390 as of June 30, 1945, is due and owing to the plaintiff and for reasons hereinafter more fully stated is a first and paramount equitable lien and charge (a) upon the properties and assets of the defendant, Sacramento Northern Railway, and (b) upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the

*Attachment B*

defendant, Sacramento Northern Railway to the extent that the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company which have been released under the Plan of Reorganization and Orders of this Court in the reorganization proceeding hereinbefore referred to. That the principal amount of said debt so due and owing to the plaintiff represents the unpaid balance of the purchase price of properties purchased by and now owned by the defendant, Sacramento Northern Railway, and through it by its proprietor, the defendant, The Western Pacific Railroad Company, and unless the plaintiff is accorded the preferences and priority and the equitable liens herein prayed the said defendants will be unduly enriched to that extent contrary to the cardinal principles of equity and the obligations of good conscience.

## IX

That the priority and preferential status of the plaintiff's claim as an equitable lien and charge upon the properties and revenues of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, arise by operation of fundamental legal and equitable principles as applied to the facts hereinbefore alleged and hereinafter more fully developed and amplified:

It is a deep rooted principle of law of private property that one may deal with one's own as one will but shall not be suffered to do so in a manner that will adversely affect the property rights of others. This doctrine comes into play in corporate law as governing and limiting the right of a parent corporation to manage and deal with a wholly or partially owned subsidiary company. If the subsidiary is wholly owned and has no creditors whose interests might

*Attachment B*

be affected adversely the power and authority of the parent over the subsidiary is absolute but if the ownership is not complete or if there are unpaid creditors of the subsidiary the power and authority of the parent is curtailed to the extent necessary to protect the outstanding interest. It is an accepted, broad, equitable principle that corporate autonomy will not be upheld to permit fraud or injustice. This principle is particularly applicable in dealing with controlled or wholly owned subsidiary corporations which are the instrumentalities of the controlling corporation. The philosophy of this rule sometimes referred to as the "Deep Rock Doctrine" is developed in the Opinion written by Mr. Justice DOUGLAS for the Supreme Court in *Pepper v. Litton*, 308 U. S. 295, interpreting the earlier case of *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307 and is elaborated in an Article by Professor Wormser in 12 Columbia Law Review entitled "Piercing the Veil of Corporate Entity". From the inception of the ownership and control by the defendant, The Western Pacific Railroad Company, of the defendant, Sacramento Northern Railway, it has exercised all the rights and privileges of complete proprietorship, and has utilized the lines and facilities of its subsidiaries (as it was proper it should do and as it had formally advised the Interstate Commerce Commission it intended to do) to develop and secure long haul traffic for its own rails between the Sacramento Valley, in California, and Salt Lake City, in the State of Utah. In the early years of its proprietorship the properties of the defendant, Sacramento Northern Railway, yielded a substantial return upon the capital invested therein. The property was self-sustaining and would have continued to be so if its earning power had not been curtailed by its merger in 1929 with the properties of the San Francisco-Sacramento Railroad Company which was purchased at a cost of \$1,675,000 at a time when it had ceased to be self-sustaining, was operat-



*Attachment B*

ing at a deficit and was threatened with proceedings in abandonment. The combination of these properties produced an enlarged enterprise which was a valuable adjunct to the defendant, The Western Pacific Railroad Company, but which never earned for itself and its creditors any return upon the capital invested therein. There was no effort on the part of the defendant, The Western Pacific Railroad Company, to so manage the combined properties as to develop a self-sustaining earning power and there was no reason for such effort so long as it recognized the prior and paramount equity of the plaintiff's claim for repayment with lawful interest of its advances to the defendant, Sacramento Northern Railway. In railway economics the defendant, Sacramento Northern Railway, was in a special category known as "an originating carrier." Such a carrier gathers and distributes traffic which moves only a short distance over its own rails and does not produce sufficient revenue for the short line haul to pay the cost of the service. To compensate it for its service and keep it in business it is given by connecting lines a higher percentage of the revenue than a division on a mileage basis which is known as an arbitrary. This varies in amount in relation to the facts of each case. One of the objectives of The Western Pacific Railroad Company in acquiring control of the defendant, Sacramento Northern Railway, in 1925 was to avoid such an arbitrary and permit it to retain, as it subsequently did, all of the revenue derived from its own long haul of traffic originating on the line of the Sacramento Northern Railway. For more than 15 years the defendant, The Western Pacific Railroad Company, has retained all of such revenues without being asked to account to Sacramento Northern Railway for any part thereof so as to provide it with funds for the repayment of the advances made to it by the plaintiff. In such an accounting the defendant, The Western Pacific Railroad Company, as the result of judicial and



*Attachment B*

administrative decisions which stem back to the case of *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 665, will not be permitted to apply its over-all operating ratio to the business interchanged with its subsidiary, the defendant, Sacramento Northern Railway, but will be accountable to it for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto. The exact amount of such revenues is unknown and could only be determined as the result of an intricate accounting but the plaintiff alleges that the amount of such revenues approximates or exceeds \$20,000,000. In the period in which the defendant, The Western Pacific Railroad Company, retained these revenues on traffic delivered to it by the Sacramento Northern Railway it did not credit to the defendant, Sacramento Northern Railway, any interest payments on \$5,227,706 of Bonds of the Sacramento Northern Railroad (predecessor Company Bonds assumed by Sacramento Northern Railway) and did not credit to the defendant, Sacramento Northern Railway, any payment on account of principal or interest on advances which it had made in amounts (some represented by notes, some by open account) aggregating \$9,425,000 but allowed interest claims to back up and accumulate so that as of June 30, 1945 the defendant, The Western Pacific Railroad Company, appeared from the books of account to be a creditor of the defendant, Sacramento Northern Railway, in the amount of \$22,964,324. Although this indebtedness is still carried on such books it has not been treated by the defendant, The Western Pacific Railroad Company, as lawful indebtedness which it could enforce to the detriment of the plaintiff as creditor of the defendant, Sacramento Northern Railway. That this is the position of the defendant, The Western Pacific Railroad Company, is clear from its course of conduct as outlined above and as fortified by its action in causing the valid and unpaid indebtedness of the plaintiff in the

*Attachment B*

principal amount of \$856,260 to be pledged with The Railroad Credit Corporation as Accommodation Collateral for a loan obtained by the defendant, The Western Pacific Railroad Company, from The Railroad Credit Corporation without then asserting that it held claims against the defendant, Sacramento Northern Railway, aggregating \$22,964,324 or thereabout, or nearly double the amount of the then total assets of the Sacramento Northern Railway as shown by its books. That said loan has been fully satisfied and The Railroad Credit Corporation fully indemnified out of collateral furnished by The Western Pacific Railroad Company without resort to the Accommodation Collateral. Applying the Deep Rock Doctrine to the debts appearing on the books of the defendant, Sacramento Northern Railway, to (1) the plaintiff, and (2) the defendant, The Western Pacific Railroad Company, there could be little question that the defendant, The Western Pacific Railroad Company, would not be permitted to interpose the book credits of its wholly owned subsidiary, the defendant, Sacramento Northern Railway, as against the debt of the latter to the plaintiff even if such debt had not acquired an independent status as the result of the reorganization consummated as of December 31, 1944. But there can be no question at all on that point now that the plaintiff has acquired an independent status as the result of said reorganization. The unpaid loans of the plaintiff to the defendant, Sacramento Northern Railway, were of value and benefit to it only so long as the inter-corporate relationship existed between it and the defendant, the Western Pacific Railroad Company. When the reorganization of said last mentioned Company was effected by its security holders and the entire stockholdings of the plaintiff in said last named defendant were surrendered its loans to the defendant, Sacramento Northern Railway, and the plaintiff itself acquired each an independent status and the plaintiff stepped into the position of any

*Attachment B*

creditor of the Sacramento Northern Railway other than its proprietor, the defendant, The Western Pacific Railroad Company. Any other benefit to the plaintiff as the result of the making of the loans to the Sacramento Northern Railway, thereupon disappeared. On the other hand all benefits which the defendant, The Western Pacific Railroad Company, obtained by the making of the loans to the defendant, Sacramento Northern Railway, for the maintenance of a continuous flow of traffic continued. The creditors of the defendant, The Western Pacific Railroad Company, who succeeded to its ownership in the reorganization accepted this ownership with knowledge that the prior owner, the plaintiff, had loaned money to a wholly owned subsidiary, the Sacramento Northern Railway, and that the creditor making this loan would achieve a wholly independent status upon the effectuation of the reorganization. Equity will not permit the reorganization The Western Pacific Railroad Company to interpose its own alleged credits to its subsidiary in an amount which would render the independent claim of the plaintiff substantially valueless while retaining for itself all of the benefits enjoyed by its continuance of the ownership of the defendant, Sacramento Northern Railway.

## X

That the defendant, Sacramento Northern Railway, enlarged in the manner and by the process above outlined has always been operated autonomously although some, if not all, of its organization or personnel are also officers or employees of the defendant, The Western Pacific Railroad Company, and all of the traffic originated and gathered by it except a relatively unimportant part thereof has been delivered by it to said defendant, The Western Pacific Rail-

*Attachment B*

road Company, as a connecting carrier in accordance with the usages and practices of the railway industry and with the provisions of the Interstate Commerce Act, all of which require just and equitable rates and fair and equitable divisions thereof between connecting and participating carriers. Such method of operation was pursued by the defendant, The Western Pacific Railroad Company, prior to the appointment in 1935 of Trustees in this proceeding and prior to the institution of this proceeding on August 2, 1935, and was continued by the Trustees appointed herein during the full period of their trusteeship and since their trusteeship ended and the defendant The Western Pacific Railroad Company has been revested with its properties as of December 31, 1944 has been pursued by the defendant, The Western Pacific Railroad Company, but at no time during any of these three periods has there been any audit and judicial settlement of the inter-line accounts between defendant, Sacramento Northern Railway, and defendant, The Western Pacific Railroad Company and/or its Trustees. Under the law and the usages and practices of the railroad industry inter-line accounts are running accounts which are subject to audit at any time without regard to the statute of limitations because, as is expressly provided in California by Section 344 of the Code of Civil Procedure, the time ordinarily runs from the date of the latest entry and new entries occur daily and under a long line of judicial decisions in federal courts any credit balance shown to be due on such an audit is a preferential claim entitled to priority over mortgage liens. By reason of these facts the defendant, Sacramento Northern Railway, is entitled to an audit of its inter-line accounts with the defendant, The Western Pacific Railroad Company, and that such an audit will show that at all times the division of through rates on interchanged business has involved a loss to Sacramento Northern Railway and a



*Attachment B*

profit to The Western Pacific Railroad Company, except that in certain war years the defendant, Sacramento Northern Railway, was also operating profitably. That the defendant, The Western Pacific Railroad Company, has received in business delivered to it by Sacramento Northern Railway on the basis of data available to the plaintiff and believed to be accurate more than \$20,000,000 of gross revenue of which under any just segregation formula more than 50% would be fairly and justly chargeable against the defendant, The Western Pacific Railroad Company, in any equitable retroactive adjustment of the divisions underlying such inter-line settlements. That Sacramento Northern Railway is entitled to a judicial settlement of its inter-line carrier accounts with the defendant, The Western Pacific Railroad Company, for the periods (a) from the date of such audit backward to December 31, 1944, being the post-reorganization period; (b) from December 31, 1944, to August 2, 1935, being the full period of judicial operation and from August 2, 1935 back to but not through any prior judicial settlement of such accounts.

## XI

Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The



*Attachment B*

Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.

## XII

That no demand has been made by the plaintiff upon Sacramento Northern Railway for the institution of the derivative action herein alleged against The Western Pacific Railroad Company for the reason that Sacramento Northern Railway is a wholly-owned subsidiary of the defendant, The Western Pacific Railroad Company, its own parent; is so dominated and controlled by it in all respects that any suit instituted by it against the defendant, The Western Pacific Railroad Company, would in contemplation of a court of equity be a suit by the parent against itself and such a demand would be futile. That the defendant, Sacramento Northern Railway, being under the domination and control of the defendant, The Western Pacific Railroad Company, will not prosecute any action against the defendant, The Western Pacific Railroad Company, for the benefit of its creditors other than the defendant, The Western Pacific Railroad Company, and will not to that end apply to the Interstate Commerce Commission for an appropriate order fixing just and equitable divisions of revenues derived from inter-change business for the past periods hereinbefore referred to and for the future and that the plaintiff and other creditors of the defendant, Sacramento Northern Railway, may be remediless in the

*Attachment B*

premises unless this Court by timely appointment of Receivers shall give such creditors the protective equivalent of an independent management.

## XIII

That an analysis of the accounts of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, in relation to the earnings of each from interchanged traffic and a restatement of such accounts on the basis of an appropriate formula will, as the plaintiff verily believes, show that the defendant, The Western Pacific Railroad Company, has absorbed earnings of the Sacramento Northern Railway far in excess of the full amount of the principal of and accrued interest upon the plaintiff's claim as stated at June 30, 1945 in the amount of \$1,441,390.55.

## XIV

That the defendant, American Trust Company, is Trustee under an Indenture dated July 1, 1918, securing Bonds outstanding in the amount of \$5,224,373 or thereabouts. Said Indenture and the Bonds issued thereunder were executed by Sacramento Northern Railroad and were assumed by the defendant, Sacramento Northern Railway and constitute a lien upon properties for which the aforesaid principal sum of \$856,260 represents unpaid purchase money, and as Trustee under said Indenture said American Trust Company has an interest in the subject matter of this suit.

WHEREFORE, the plaintiff prays:

1. That the plaintiff's claim in the amount of \$1,441,390.55 together with interest accrued from June 30, 1945,

*Attachment B*

be adjudged and decreed to be a valid and subsisting indebtedness of, and due it from, the defendant, Sacramento Northern Railway.

2. That the inter-line accounts between the defendant, Sacramento Northern Railway and the defendant, The Western Pacific Railroad Company, be judicially settled in accordance with the usages and principles of equity and that the defendant, The Western Pacific Railroad Company, be adjudged and decreed to pay to the defendant, Sacramento Northern Railway, for the benefit of the plaintiff herein and any other creditors similarly situated in priority to any creditor claims of the defendant, The Western Pacific Railroad Company, any and all amounts that may be found upon such judicial settlement to be due and owing to the Sacramento Northern Railway from the defendant, The Western Pacific Railroad Company.

3. That upon default of the payment to the plaintiff herein of the full amount of the indebtedness adjudged and decreed to be due the plaintiff from the defendant, Sacramento Northern Railway, within a time to be fixed by this Court all of the properties of the defendant, Sacramento Northern Railway, be sold free from all liens to provide for the payment and satisfaction of creditors of the defendant, Sacramento Northern Railway, in the order of their priorities; that a receiver be appointed by this Court of all and singular the railroads, rolling stock, franchises, rights properties and premises belonging to the defendant, Sacramento Northern Railway, together with the rents, issues, profits, revenues and income thereof, with the usual powers of a receiver in such cases including the power to operate said railroads and property and collect and receive the income and tolls thereof and to take into possession all properties, money, credits and everything of value belong-

*Attachment B*

ing to said defendant, Sacramento Northern Railway, and also including the right to sue or become a party to any suit for the recovery or collection of any assets or moneys belonging to said defendant, Sacramento Northern Railway.

4. That the plaintiff herein be authorized in the name of, or on behalf of the defendant, Sacramento Northern Railway, to apply to the Interstate Commerce Commission for any administrative or other relief under the amended Interstate Commerce Act which may be necessary or proper in connection with the establishment, both retrospectively and prospectively, of just and reasonable divisions of carrier revenues on business interchanged between Sacramento Northern Railway and the defendant, The Western Pacific Railway Company, or in connection with a judicial settlement of their accounts.

5. That the plaintiff may have such other and further relief as to the Court may seem meet.

THE WESTERN PACIFIC RAILROAD CORPORATION,

By LEROY R. GOODRICH,  
Bank of America Building,  
Oakland 12, California.  
*Its Attorney.*

Dated                   , 1948.

FRANK C. NICODEMUS, JR.,  
A. PERRY OSBORN,  
*Of Counsel.*







[Title of District Court and Cause.]

Respondent's Points and Authorities in Support of  
Its Answer and Return to Petition of The West-  
ern Pacific Railroad Corporation for Clarifica-  
tion or Modification of Final Order.

I.

By its order of March 19, 1947 herein, this Court conclusively determined that Petitioner's asserted claim was "released and discharged," and that the assertion thereof "was and is barred and enjoined," by this Court's final order of March 28, 1946.

Orders and decrees of courts of bankruptcy, in proceedings in reorganization, are res judicata of the issues determined.

*Stoll v. Gottlieb* (1938) 305 U. S. 165, 59 S. Ct.

134, 83 L. Ed. 104, where res judicata effect was given to order cancelling guaranty by third person of bonds of debtor.

*Chicot County Drainage District v. Baxter*

*State Bank* (1940) 308 U. S. 371, 60 S. Ct.

317, 84 L. Ed. 329, where res judicata effect was given to readjustment order under Municipal Debt Readjustment Act even though that Act was later, in another case, held unconstitutional by the Supreme Court.

The rule is the same even though it be claimed that the bankruptcy court's order was too broad and went beyond the petition upon which it was made. See:

*In re National Public Service Corporation*  
(CCA 2d, 1937) 88 F. (2d) 19.

By its order herein dated March 19, 1947, holding The Western Pacific Railroad Corporation in contempt, this Court, speaking by Judge St. Sure, expressly held that the claim which The Western Pacific Railroad Corporation now seeks to assert in behalf of Sacramento Northern Railway to a retroactive readjustment of divisions of rates was barred and enjoined by the provisions of the Final Order herein dated March 28, 1946. The entire text of the order of March 19, 1947 has been incorporated in this Respondent's answer and return to the petition herein, as Exhibit F thereto. We quote herewith paragraph (f) of that Order:

“(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this Court.” (Emphasis supplied.)

The order of March 19, 1947 might have been open to direct review upon appeal. It was not, and is not, subject to review otherwise. No appeal was taken. The order was allowed to become final, and the Petitioner dismissed its suit as to The Western Pacific Railroad Company.

The order of March 19, 1947 is therefore res judicata of the issue and precludes any reconsideration of the scope and effect of the Final Order as bar-

ring the Petitioner's attempted assertion of a claim to a retroactive readjustment of divisions of rates between the Sacramento Northern Railway and The Western Pacific Railroad Company.

## II.

This Court having determined that Petitioner's claim has been "released and discharged" by Final Order of March 28, 1946, no ground has been or can be stated for modifying the injunctive provisions of the Final Order.

Petitioner represents that it has a claim that it is entitled to assert derivatively in behalf of Sacramento Northern Railway to a retroactive readjustment of divisions of rates between the latter and the Company; that this claim took priority over the Company's mortgages and survived the reorganization proceedings and constitutes a present valid claim; that the injunctive provisions of the Final Order were drawn so broadly as to bar such a claim, although such was not the intent of the Final Order; wherefore, the Court is asked to modify the injunctive provisions of the Final Order so as to permit suit upon this derivative claim.

By its order of March 19, 1947, adjudging Petitioner guilty of contempt, this Court expressly determined that the alleged derivative claim, if it ever existed, "was released and discharged by said Final Order." This is a final and binding determination that Petitioner's claim has no present existence—that there is nothing that Petitioner may now assert. No appeal having been taken from the order of March 19, 1947, it is now, under the au-

thorities cited under Point I, *supra*, *res judicata* as to Petitioner that the claim has been discharged.

It therefore appears that Petitioner's petition seeks a modification of the injunctive provisions of the Final Order so that it may assert a claim which the Court has already conclusively determined to have been released and discharged. In the very nature of the case the petition fails to state any ground for modification.

### III.

This Court correctly determined, by its order of March 19, 1947 in the contempt proceeding, that Petitioner's claim is barred by the Final Order of March 28, 1946 in the reorganization proceeding.

Claims which might have been but were not presented during the reorganization proceeding may not be later asserted.

Standard Steel Works v. American Pipe & Steel Corp. (CCA 9th 1940) 111 F. (2d) 1000.

American Service Co. v. Henderson, (CCA 4th 1941) 120 F. (2d) 525.

In re Corona Radio & Television Corp., (CCA 7th 1939) 102 F. (2d) 959.

The statute explicitly declares that, upon confirmation of the reorganization plan by the judge, the provisions of the plan shall be "binding upon \* \* \* all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed,



whether or not approved, including creditors who have not, as well as those who have, accepted it.” (Section 77(f) of Federal Bankruptcy Act. (United States Code, Title II, Chap. 8, Sec. 205)).

The plan of reorganization, formulated by the Interstate Commerce Commission and confirmed by this Court, expressly finds that the unsecured claims of The Western Pacific Railroad Corporation are “without value.” (Finance Docket 10913, Western Pacific Railroad Company Reorganization, 233 I.C.C. 409, 452).

This Court’s final order of March 28, 1946 declares, *inter alia*, that

“The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.”

(The “said order” referred to in the closing words of the foregoing is the revesting order of November 27, 1944, which contains no provision preserving claims of the character here attempted to be asserted by Petitioner.)

The injunctive provisions of the Final Order are commensurate with the “release and discharge”. By paragraph 6 of the Final Order “All persons \* \* \* are hereby perpetually restrained and en-

joined from instituting \* \* \* any suit \* \* \* against The Western Pacific Railroad Company, \* \* \* directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), \* \* \* and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this court), \* \* \*."

We again note that no sanction can be found in any prior order of the Court for the institution of suit upon the Petitioner's claim.\*

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\*In the contempt proceedings the Petitioner unsuccessfully contended—and it now seeks to renew that contention—that suit upon the Petitioner's claim is permitted by a prior order of the Court. (See answer and return of The Western Pacific Railroad Corporation to petition and order to show cause in the contempt proceeding, particularly paragraphs 6 to 10, inclusive, and the rejoinder of The Western Pacific Railroad Corporation in the same proceeding, page 3.) Judge St. Sure expressly found that the claim had been "released and discharged" by the Final Order and that the institution of the suit "has not been provided for or permitted by any order of this Court."

In summary, the assertion of Petitioner's claim against the reorganized The Western Pacific Railroad Company is barred by the provisions of the statute, by the terms of the reorganization plan, which has long since been consummated, and by the provisions of this Court's Final Order in the reorganization proceeding. It was correctly determined, by the order in the contempt proceeding, that this claim has been "released and discharged" and that the institution of suit upon it is not permitted by any prior order of court.

#### IV.

Petitioner has no standing to assert claims of Sacramento Northern Railway.

A claimant who has not reduced his claim to judgment is not entitled to maintain a creditor's bill or to seek any equitable relief in connection with claims which the alleged debtor may have against third persons.

Swan Land & Cattle Co. v. Frank (1893) 148

U. S. 603, 13 Sup. Ct. 691, 694, 37 L. Ed. 577.

Hoehn v. Crews, 144 F. (2d) 665 (CCA 10th

1944) cert. denied, 323 U. S. 773, 65 Sup. Ct.

132, 135, 89 L. Ed. 618, appeal by one defendant affirmed on other grounds.

Nielsen v. Gillespie (1929) 97 Cal. App. 319, 275 P. 500.

Delaney Producing & Refining Co. v. Crystal

Petroleum Products Co. (1928) 88 Cal. App.

784, 264 P. 521.

Petitioner has not prosecuted its claim to judg-

ment against the Sacramento Northern Railway.\* Unless and until it has done so, and the judgment shall have been returned unsatisfied, it has no standing to bring suit against The Western Pacific Railroad Company upon any alleged indebtedness of the latter to the Sacramento Northern Railway.

V.

This Court Has no Jurisdiction to Modify the Final Order at the Request of This Petitioner.

By a petition filed in the reorganization proceeding on March 18, 1946, the Reorganization Committee requested a Final Order terminating the proceeding. This Court on that day directed that a hearing be held on the petition on March 28, 1946, and that notice of the hearing be sent to all parties to the reorganization, including Petitioner. Notice was sent as directed. This Court on March 28, 1946, after hearing, signed and filed the Final Order discharging the debtor from all of its liabilities (except as otherwise expressly provided) and closing the proceeding. The objections to the order which Petitioner now asserts could have been but were not asserted by Petitioner at the hearing upon the petition of the Reorganization Committee; nor did Petitioner appeal from the Final Order. Under these circumstances, the Court has

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\*The asserted indebtedness of Sacramento Northern Railway to Petitioner arose in 1928, some twenty (20) years past. The claim is believed to have been long since barred by limitation. If held barred, there could be no predicate for a creditor's bill against The Western Pacific Railroad Company.

no jurisdiction to modify the Final Order at the request of this Petitioner.

*Duebler v. Sherneth Corp.*, (CCA 2nd 1947)  
160 F. (2d) 472.

*Reese v. Beacon Hotel Corp.*, 149 F. (2d) 610  
(CCA 2nd 1945).

*In re Sherland Bldg. Corp.*, (N. D. Ind. 1939)  
29 F. Supp. 985.

The Court has no jurisdiction, without first re-opening the case, to modify its Final Order in a bankruptcy proceeding in the absence of an appropriate reservation of jurisdiction.\*

*In re Argyle-Lake Shore Corporation*, (CCA 7  
1938) 98 F. (2d) 372.

*In re Peyton Realty Company*, (CCA 3, 1945)  
148 F. (2d) 771.

*In re Wedgewood Hotel Company*, (CCA 7,  
1942) 125 F. (2d) 327.

*In re Corona Radio & Television Corporation*,  
(CCA 7, 1939) 102 F. (2d) 959.

In the present instance this Court reserved no jurisdiction to modify its Final Order and the present petition is in no sense a petition to reopen the case.

A court sitting in a bankruptcy proceeding will not in any event reopen a case where, as here, it has no power to grant the ultimate relief sought.

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\*It has been held that "reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court." *Reese v. Beacon Hotel Corp.*, 149 F. (2d) 610, 611; (CCA 2nd, 1945); citing cases.



Duebler v. Sherneth Corporation, (CCA 2, 1947) 160 F. (2d) 472.

Milando v. Perrone, (CCA 2, 1946) 157 F. (2d) 1002.

Phillips v. Tarrier Co. of Delaware, (CCA 5, 1938) 93 F. (2d) 674.

## VI.

This Court, Even if It Had Jurisdiction to Modify the Final Order, Should Not Exercise That Jurisdiction Under the Circumstances Here Presented.

There is no equity in the petition. Even if the Court were to conclude that it has jurisdiction to modify the Final Order at the request of this Petitioner, that jurisdiction should not be exercised in the instant proceeding for the following reasons:

(a) The divisions of rates between Sacramento Northern Railway and the Company were established at a time when the Petitioner, as parent of the railroad group of which the Sacramento Northern Railway and the Company were members, had full control over such divisions of rates;

(b) Petitioner for many years prior to the reorganization and at all times during the reorganization was familiar with such divisions of rates and did not complain of them;

(c) Petitioner was not only a party to the reorganization proceeding but, prior to the confirmation and consummation of the reorganization plan, was the sole stockholder of the Company and one of its largest unsecured creditors. Although Peti-

tioner presented its claims as a stockholder and unsecured creditor, it failed to present the claim which it now seeks to assert;

(d) Petitioner represents that the claim which it now seeks to assert, and which it failed to present or assert during the reorganization proceeding, is entitled to priority over the preexisting bond mortgages of the Debtor, and should rank with the reorganized Company's current liabilities. Thus, Petitioner seeks to gain priority, for an unsecured claim which it failed to present or assert during the reorganization proceeding, over the secured claims of creditors found to be entitled to priority under the plan of reorganization heretofore consummated;

(e) Since the entry of the Final Order, the reorganized Company has conducted its business, and investors have purchased and held securities of the reorganized Company, in reliance upon the Final Order, and such reliance makes modification of the order inequitable.

Under circumstances such as these, the Court will not entertain a request for modification of a final order in a reorganization proceeding.

*Mohonk Realty Corp. v. Wise Shoe Stores, Inc.*,  
111 F. (2d) 287 (CCA 2d 1940), cert. denied,  
311 U. S. 654, 61 Sup. Ct. 47, 85 L. Ed. 418  
(1940).

*Knapp v. Detroit Leland Hotel Co.*, (CCA 6th  
1946) 153 F. (2d) 715.

*In re Tom Moore Distillery Co.*, 52 F. Supp.  
938 (W. D. Ky. 1943).

In re McCrory Stores Corp., 19 F. Supp. 367  
(S.D. N.Y. 1937).

In re Peyton Realty Co., (CCA 3, 1945) 148  
F. (2d) 771.

In re Universal Lubricating Systems, Inc.,  
(1947) 71 F. Supp. 775.

### CONCLUSION

Doubtless it would have sufficed, in resisting the petition, to rely solely upon this Court's order of March 19, 1947 in the contempt proceeding as res judicata of the issue which Petitioner seeks again to urge upon the Court's attention. It has seemed appropriate, however, to acquaint the Court more fully with the circumstances and reasons which preclude the Petitioner from prosecuting its asserted claim against the reorganized The Western Pacific Railroad Company.

The petition for clarification or modification of this Court's final order of March 28, 1946, should be denied.

Respectfully submitted,

/s/ ALLAN P. MATTHEW

/s/ ROBERT L. LIPMAN

/s/ BURNHAM EMERSEN

Attorneys for The Western Pacific  
Railroad Company.

Of Counsel

McCUTCHEN, THORNE, MATTHEW,  
GRIFFITHS & GREENE

Dated: Oct. 25th, 1948.

## Appendix Follows

For convenient reference, we have set forth in the appendix hereto certain pertinent excerpts from the statute, the plan of reorganization and orders in the reorganization proceeding, together with the entire text of the agreement of assumption.

## APPENDIX

Excerpts from (a) Section 77 of Federal Bankruptcy Act; (b) the Western Pacific Railroad Company Reorganization Plan Formulated by Interstate Commerce Commission and Approved and Confirmed by Court; (c) Certain Orders of United States District Court in Reorganization Proceeding; and (d) Agreement of Assumption Between Reorganization Trustees and Reorganized The Western Pacific Railroad Company.

## A.

Section 77(f) of Federal Bankruptcy Act. (United States Code, Title 11, Chap. 8, Sec. 205).

Binding Effect of Confirmation; Discharge of Debtor from Liabilities; Issuance of Securities.

“(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved,

including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall,



without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1\* of Title 49 as on August 27, 1935, or thereafter amended. \* \* \* \*"

B.

Excerpts from Order of the Interstate Commerce Commission (June 21, 1939) Approving Plan of Reorganization for The Western Pacific Railroad Company. (Finance Docket No. 10913, 233 I.C.C. 409.)

(Definition of certain terms used in order.)

"The debtor shall mean the Western Pacific Railroad Company." (p. 441.)

"Consummation of the plan shall mean the transfer to the reorganized company, to the extent contemplated by the plan, of the properties and assets of the debtor." (p. 441.)

\* \* \* \*

"The reorganized company shall mean the corporation, whether the debtor or a new corporation, which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan." (p. 441.)

(Subdivision P)

\* \* \* \*

"6. The unsecured claims of the Western Pacific

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\*Interstate Commerce Act.

Railroad Corporation and the Western Realty Company and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims." (p. 452.)

"7. The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan." (p. 452.)

(Subdivision Q)

"Q. Claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan. Obligations under the debtor's equipment-trust certificates, the Baldwin lease, and the Pullman contract are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the re-

organization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding.” (pp. 452-453.)

(Subdivision R)

“R. The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled.” (p. 453.)

\* \* \* \*

“The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.” (p. 453.)

C.

Orders of United States District Court in Western Pacific Reorganization Proceeding.

(Order of United States District Court directing the revesting of the properties of the debtor in the reorganized company, etc., November 27, 1944.)

\* \* \* \*

“8. The Western Pacific Railroad Company and its proper officers are hereby authorized and di-

rected to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) Agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as 'Exhibit D,'\* the form and provisions of which are hereby approved;"

\* \* \* \*

"9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission."

\* \* \* \*

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\*The form and provisions of this "Exhibit D" are identical with the form and provisions of the "Agreement of Assumption," the text of which is reproduced in full in subdivision D of this memorandum.

“And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment, being the coupons which this Court by orders of March 11, 1936 and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor’s Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by said Railroad Company of the agreement of assumption referred to in paragraph ‘8(a)’ above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor’s Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor’s Trustees, and said Railroad Company shall assume only the valid and outstand-



ing obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, without limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pur-

suant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided;”

\* \* \* \*

“15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, gar-

nishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belonging to or in the possession of said Railroad Company on and after the time specified in paragraph '11' hereof, by reason of or growing out of any obligation or obligations heretofore incurred by the debtor or the debtor's Trustees herein."

(Final Order of United States District Court,  
March 28, 1946)

#### Final Order

"The petition filed March 18, 1946 by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above named, for an order approving their expenses, discharging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946, and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and

character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.”

\* \* \* \*

“Now, Therefore, it is hereby Ordered, Adjudged and decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor’s estate, dated and entered May 21, 1945.”

\* \* \* \*

“5. That the order of this Court dated and

entered November 27, 1944 in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's



estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings."

\* \* \* \*

"9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or

otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the debtor's estate, the reorganization proceedings in this Court entitled in the Matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated: March 28, 1946.

A. F. St. SURE  
District Judge."

D.

Agreement of Assumption.

"Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled 'In the Matter of The Western Pacific Railroad Company, Debtor,' No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The

Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket No. 10913, made a report and order which, among other thing, approved and authorized the assumption by said The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on November 27, 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of said The Western Pacific Railroad Company, duly appointed in said proceeding (hereinafter called the 'Trustees'), have, by deed dated December 29th, 1944, remised, released, transferred, conveyed and quit-claimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered November 27, 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, make this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all

suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability, loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central



Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H. P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to

September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936 and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor.

6. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 A.M., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this 14th day of December, 1944.

THE WESTERN PACIFIC RAILROAD  
COMPANY

By CHARLES ELSEY  
President

(Corporate Seal)

Attest:

C. L. DROIT  
Secretary."

[Endorsed]: Filed Oct. 25, 1948.

[Title of District Court and Cause.]

Order Denying Petition of the Western Pacific Railroad Corporation for Clarification or Modification of Order of March 28, 1946.

Ordered: The petition of The Western Pacific Railroad Corporation, filed herein September 30, 1947, for clarification or modification of the injunctive provisions of the final order herein dated March 28, 1946, having been agrued and submitted, the same is hereby denied.

Dated: October 29, 1948.

/s/ LOUIS GOODMAN

United States District Judge.

[Endorsed]: Filed Oct. 29, 1948.

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[Title of District Court and Cause]:

### NOTICE

To McCutchen, Thomas, Matthew, Griffiths & Greene, Balfour Bldg. Leroy R. Goodrich, Bank of America Bldg., Oakland.

You Are Hereby Notified that on Friday, October 20, 1948, Judge Goodman made an order denying the petition of the Western Pacific Railroad Corporation for Clarification or Modification of Mar. 28, 1946.

San Francisco, California Nov. 1, 1948

C. W. CALBREATH

Clerk, U. S. District Court

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the Western Pacific Railroad Corporation, petitioner in the above entitled matter, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from an order made and entered by the District Court on October 20, 1948, denying the petition of the Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order herein, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint in Action No. 26333-H, entitled Western Pacific Railroad Corporation, Plaintiff, against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.

Signed: November 17, 1948.

LEROY R. GOODRICH

FRANK C. NICODEMUS, JR.

A. PERRY OSBORN

By /s/ LEROY R. GOODRICH

Attorneys for Petitioner

[Endorsed]: Filed Nov. 17, 1948.

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[Title of District Court and Cause.]

### AMENDED NOTICE OF APPEAL

Notice is hereby given that the Western Pacific Railroad Corporation, petitioner in the above entitled matter, hereby appeals to the United States

Court of Appeals for the Ninth Circuit from an order made and entered by the District Court on October 29, 1948, denying the petition of the Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order herein, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint in Action No. 26333-H, entitled Western Pacific Railroad Corporation, Plaintiff, against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.

Signed: November 29, 1948.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for Petitioner

[Endorsed]: Filed Nov. 29, 1948.

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[Title of District Court and Cause.]

### STIPULATION AND ORDER EXTENDING TIME

It Is Hereby Stipulated and Agreed, by and between the respective parties that The Western Pacific Railroad Corporation, petitioner in the above entitled matter, having filed on November 17, 1948, its notice of appeal to the United States Court of Appeals for the Ninth Circuit from an order made



and entered by the District Court on October 29, 1948, denying the petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order of the District Court, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint, as recited in said petition, may have to and including January 19, 1949, within which to file its Designation of Contents of Record on Appeal and its Statement of Points on which appellant intends to rely.

Dated: December 23, 1948.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for Appellant

ALLAN P. MATTHEW  
ROBERT L. LIPMAN  
BURNHAM ENERSEN  
McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE

By /s/ ROBERT L. LIPMAN  
Attorneys for Respondent

No extension of time heretofore obtained.

### ORDER

Pursuant to the above Stipulation, and good cause appearing therefor, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, may have to and including the 19th day of

January, 1949, within which to file its Designation of Contents of Record on Appeal and its Statement of Points on which appellant intends to rely.

Dated: December 23rd, 1948.

/s/ LOUIS GOODMAN

U. S. District Court Judge

[Endorsed]: Filed Dec. 23, 1948.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE  
APPELLANT, THE WESTERN PACIFIC  
RAILROAD CORPORATION WILL RELY

The Western Pacific Railroad Corporation has heretofore appealed to the United States Court of Appeals for the Ninth Circuit from an Order made by the above entitled District Court on October 29, 1948, denying the Petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the Final Order of the District Court, dated March 28, 1946, for the purpose of permitting The Western Pacific Railroad Corporation to file an Amended Bill of Complaint, as recited in said petition.

Appellant hereby makes the following statement of points on which it will rely on its appeal:

I. The learned District Court erred in holding the Order made on March 19, 1947 by Judge A. F. St. Sure to constitute a bar to the filing and prosecution of the cause of action or causes of action alleged in the proposed Amended Bill of Complaint

in which The Western Pacific Railroad Company is named as one of the parties defendant, and in denying the plaintiff the relief sought, for each and all of the following reasons:

A. The Final Order or Decree of March 28, 1946 in the reorganization proceedings involving The Western Pacific Railroad Company expressly excepts from its injunctive provisions any cause of action against the respondent, The Western Pacific Railroad Company, growing out of inter-line accounts prior to August 2, 1935, and does not prohibit a derivative cause of action by this plaintiff on behalf of Sacramento Northern Railway against the respondent, The Western Pacific Railroad Company, to recover amounts due under just and equitable division of revenues from business interchanged prior to August 2, 1935.

B. The proposed Amended Bill of Complaint contains the following restrictive paragraph not appearing in the original Bill of Complaint considered by Judge St. Sure, under which the Amended Bill of Complaint, insofar as it sets forth a derivative cause of action in favor of Sacramento Northern Railway, expressly excludes any cause of action not falling within the exceptive provisions of the Final Order or Decree of March 28, 1946:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby

limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944."

C. The Assumption Agreement executed by the defendant, The Western Pacific Railroad Company, renders it liable in a derivative action in favor of Sacramento Northern Railway by this appellant to recover amounts due under just and equitable division of revenues from business interchanged with Thomas M. Schumacher and Sidney M. Erhman, Trustees in Reorganization, subsequent to August 2, 1935, and prior to December 31, 1944.

D. The Decree of March 28, 1946, and the Order made by Judge St. Sure on March 19, 1947, do not extend to or prohibit the prosecution by the plaintiff and appellant herein of a derivative cause of action against The Western Pacific Railroad Company to recover amounts due under just and equitable division of revenues from business interchanged subsequent to December 31, 1944.

E. The Final Order or Decree of March 28, 1946, and the Order of Judge St. Sure entered March 19, 1947, do not prevent or purport to prevent the plaintiff and appellant, The Western Pacific Railroad Corporation, from joining in a suit properly instituted and pending against Sacramento Northern Railway, which was not a party to the reorganization proceeding, wherein said March 19, 1947 Order was entered, any proper or necessary party to a complete determination of such cause of action against Sacramento Northern Railway, even though such proper or necessary party happens to be the respondent, The Western Pacific Railroad Company, or any other party to said reorganization proceeding.

II. The Final Order or Decree of March 28, 1946 should be liberally construed to permit the filing and prosecution of any legitimate lawsuit not within the spirit and intent of its restrictive provisions, in which category this proposed Amended Complaint indubitably falls; it being axiomatic that the doors of the Court should be as wide open as the doors of a church.

LEROY R. GOODRICH

FRANK C. NICODEMUS, JR.

A. PERRY OSBORN

By /s/ LEROY R. GOODRICH

Attorneys for The Western Pacific  
Railroad Corporation

[Endorsed]: Filed Jan. 17, 1949.



[Title of District Court and Cause.]

STIPULATION FOR ORDER EXTENDING  
TIME

Whereas, The Western Pacific Railroad Corporation has filed notice of appeal herein from the order of the above entitled court dated October 29, 1948 denying the Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946; and

Whereas, the appellant and respondent, The Western Pacific Railroad Company, have by written stipulation designated the record on appeal.

It Is Hereby Stipulated, that the time within which to docket the record on appeal may be extended by order of the District Court to January 28, 1949.

Dated the 19th day of January, 1949.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for The Western Pacific  
Railroad Corporation  
ALLAN P. MATTHEW  
ROBERT L. LIPMAN  
BURNHAM ENERSEN

By /s/ ROBERT L. LIPMAN  
Attorneys for The Western Pacific  
Railroad Company

ORDER

Good cause appearing therefore, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, herein may have to and including January 28, 1949, to docket the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated the 19th day of January, 1949.

/s/ LOUIS GOODMAN  
District Judge

[Endorsed]: Filed Jan. 19, 1949.

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[Title of District Court and Cause.]

STIPULATION FOR RECORD ON APPEAL

Whereas, The Western Pacific Railroad Corporation has filed notice of appeal herein from the order of the above entitled court dated October 29, 1948 denying the Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946;

Now, Therefore, The Western Pacific Railroad Corporation, appellant, and The Western Pacific Railroad Company, appellee, by this written stipulation designate the following to be included in the record on appeal, to wit:

(1) Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946

(2) Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions, of the Final Order Herein, Dated March 28, 1946

(3) Memorandum of The Western Pacific Railroad Corporation in Support of Petition for Clarification or Modification of the Injunctive Provisions of the Final Order Herein Dated March 28, 1946

(4) Respondent's Points and Authorities in Support of Its Answer and Return to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of Final Order

(5) Order Denying Petition of The Western Pacific Railroad Corporation for Clarification or Modification of Order of March 28, 1946—dated October 29, 1948

(6) Notice—dated November 1, 1948 (Clerk's notice of order denying petition for clarification or modification.)

(7) Notice of Appeal—dated November 17, 1948

(8) Amended Notice of Appeal—dated November 29, 1948

(9) Stipulation and Order Extending Time—dated December 23, 1948

(10) Petition of The Western Pacific Railroad Company for an Order to Show Cause (including Bill of Complaint attached as Exhibit A)

(11) Order to The Western Pacific Railroad Corporation to Show Cause Why It Should not be

Adjudged Guilty of Contempt—dated August 30, 1946

(12) Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

(13) Reply of Petitioner, The Western Pacific Railroad Company, to Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

(14) Order Adjudging The Western Pacific Railroad Corporation Guilty of Contempt of the Final Order of This Court Herein—dated March 19, 1947

(15) Order—dated August 2, 1935 (Approving petition under Section 77 and authorizing debtor to operate property, pay claims incurred within six months, etc.)

(16) Order—dated August 20, 1935 (Fixing time for presentation of claims.)

(17) Order Appointing Trustees — dated September 23, 1935

(18) Order of Interstate Commerce Commission—dated June 21, 1939 (Order approving and setting forth plan of reorganization.)

(19) Order Approving Plan of Reorganization for Debtor—dated August 15, 1940

(20) Order Confirming Plan of Reorganization—dated October 11, 1943

(21) Order Making an Allowance to be Paid Out of Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection With the Proceedings and Plan of Reorganization by the

Reorganization Committee—dated October 23, 1944

(22) Order Directing the Revesting of Properties of the Debtor in the Debtor Company, Fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying Out of the Plan—dated November 27, 1944

(23) Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, Approving and Confirming Their Acts and Accounts, Discharging Them as Trustees and Exonerating Their Bonds—dated May 21, 1945

(24) Final Order—dated March 28, 1946

Dated the 14th day of January, 1949

/s/ LEROY R. GOORDICH

/s/ FRANK C. NICODEMUS, JR.

/s/ A. PERRY OSBORN

Attorneys for The Western Pacific  
Railroad Corporation, Appellant

/s/ ALLAN P. MATTHEW

/s/ ROBERT L. LIPMAN

/s/ BURNHAM ENERSEN

Attorneys for The Western Pacific  
Railroad Company, Appellee

[Endorsed]: Filed Jan. 17, 1949.



[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the original documents filed in this court in the above-entitled matter and that they constitute the record on appeal herein as designated by the parties.

Order approving petition under Section 77, filed August 2, 1935

Order fixing time for presentation of claims, filed August 20, 1935

Order appointing trustees, filed September 23, 1935

Report and order of the Interstate Commerce Commission, filed July 29, 1939

Order approving Plan of Reorganization for Debtor, filed August 15, 1940

Order confirming plan of reorganization, filed October 11, 1943

Order making allowance to be paid out of Debtor's estate for certain expenses, etc., filed October 23, 1944

Order directing the revesting of properties of the Debtor, etc., filed November 27, 1944

Order approving and confirming ninth and final report and accounting by the trustees, etc., filed May 21, 1945

Final order, filed March 28, 1946

Petition of the Western Pacific Railroad Com-

pany for an order to show cause, filed August 30, 1946

Order to the Western Pacific Railroad Corporation to show cause, filed August 30, 1946

Answer and return of the Western Pacific Railroad Corporation to order to show cause, filed September 23, 1946

Reply of petitioner to answer and return of the Western Pacific Railroad Corporation to order to show cause, filed October 2, 1946

Order adjudging the Western Pacific Railroad Corporation guilty of contempt of the final order, filed March 20, 1947

Petition of the Western Pacific Railroad Corporation for clarification or modification of the final order, filed September 30, 1947

Answer and return of the Western Pacific Railroad Company to petition for clarification, etc., filed September 15, 1948

Memorandum of the Western Pacific Railroad Corporation in support of petition for clarification, etc., filed October 25, 1948

Respondent's points and authorities in support of its answer and return to petition for clarification, etc., filed October 25, 1948

Order denying petition of the Western Pacific Railroad Corporation for clarification or modification of final order, filed October 29, 1948

Copy of notice sent to attorneys on above order (dated Nov. 1, 1948)

Notice of appeal, filed November 17, 1948

Amended Notice of appeal, filed November 29, 1948

Order extending time to file designation of record on appeal and Statement of points on which appellant intends to rely, filed December 23, 1948

Statement of points on which appellant will rely, filed January 17, 1949

Stipulation and order extending time to docket record on appeal, filed January 19, 1949

Stipulation for contents of record on appeal, filed January 17, 1949

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of January, 1949.

(Seal)                      C. W. CALBREATH,  
Clerk

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[Endorsed]: No. 12159. United States Court of Appeals for the Ninth Circuit. In the Matter of The Western Pacific Railroad Company, Debtor. The Western Pacific Railroad Corporation, Appellant, vs. The Western Pacific Railroad Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 20, 1949.

/s/ PAUL P. O'BRIEN  
Clerk of the United States Court of Appeals  
for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12159

In the Matter of THE WESTERN PACIFIC  
RAILROAD COMPANY, Debtor  
THE WESTERN PACIFIC RAILROAD  
CORPORATION,

Appellant

vs.

THE WESTERN PACIFIC RAILROAD  
COMPANY,

Appellee

STATEMENT OF POINTS

The appellant, The Western Pacific Railroad Corporation, hereby adopts as its points on appeal the Statement of Points appearing in the Transcript of the Record certified by the District Court on appeal herein.

Dated: January 25, 1949.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for The Western Pacific Railroad  
Corporation, Appellant

(Acknowledgment of Service.)

[Endorsed]: Filed January 26, 1949. Paul P.  
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION DESIGNATING RECORD  
FOR PRINTING

It is hereby stipulated by and between the appellant, The Western Pacific Railroad Corporation, and the appellee, The Western Pacific Railroad Company, that the said parties hereby designate for printing the entire record on appeal certified by the District Court on appeal, except and excluding the following:

(1) In the Report and Order of the Interstate Commerce Commission, dated June 21, 1939, omit the report portion thereof, consisting of the first fifty-two pages.

(2) In the Order Directing the Revesting of Properties of the Debtor in the Debtor Company, Fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying Out of the Plan, dated November 27, 1944, omit Exhibits A, B, C, E and F attached thereto.

(3) In the Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order of the District Court, dated March 28,



1946, omit therefrom Exhibits A, B, C, D, E, and F.

Dated: January 25, 1949.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for The Western Pacific  
Railroad Corporation, Appellant  
ALLAN P. MATTHEW  
ROBERT L. LIPMAN  
BURNHAM ENERSON

By /s/ ROBERT L. LIPMAN  
Attorneys for The Western Pacific  
Railroad Corporation, Appellant

[Endorsed]: Filed January 26, 1949. Paul P.  
O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

### STIPULATION AND ORDER

The hereinafter enumeraed documents, certified to this Court by the District Court as a part of the record on appeal in the above entitled matter, are also a part of the printed record on appeal to this Court in Cause No. 9714 entitled:

In the Matter of The Western Pacific Railroad Company, Debtor.

The Western Pacific Railroad Corporation, a cor-

poration, The Western Pacific Railroad Company, a corporation, and Irving Trust Company, a corporation, as substituted trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, A. C. James Co., a corporation, The Railroad Credit Corporation, a corporation, Appellants, vs. Institutional Bondholders Committee and Reconstruction Finance Corporation, Appellees.

The said cause as determined by this Court is reported in 124 Fed. (2d) 136, and as determined subsequently by the Supreme Court of the United States is reported in 318 U. S. 448.

The enumerated documents and their respective positions in the record in said cause, No. 9714, are:

(1) Order, dated August 2, 1935, signed by Judge St. Sure, appearing at page 11, Volume I of said record.

(4) Order of the Interstate Commerce Commission, in Finance Docket No. 10913, dated June 21, 1939, appearing at page 362 of said record.

(5) Order Approving Plan of Reorganization, dated August 15, 1940, signed by Judge St. Sure, appearing at page 1600 of said record.

The parties hereto stipulate and agree that the foregoing enumerated documents need not be reprinted in the matter now before the United States Court of Appeals, Cause No. 12159, but that this Stipulation and Order shall be printed in lieu thereof, and that any party to this appeal, as well

as this Court, may quote or refer to any of said documents as if printed as part of the record of this appeal.

Dated: February 9, 1949.

LEROY R. GOODRICH  
FRANK C. NICODEMUS, JR.  
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH  
Attorneys for The Western Pacific  
Railroad Corporation, Appellant.

ALLAN P. MATTHEW  
ROBERT L. LIPMAN  
BURNHAM ENERSON

By /s/ ROBERT L. LIPMAN  
Attorneys for The Western Pacific  
Railroad Company, Appellee.

### ORDER

It is so ordered.

/s/ WILLIAM DENMAN  
Senior Circuit Judge

/s/ CLIFTON MATHEWS

/s/ WILLIAM HEALY  
Judges U. S. Court of Appeals  
for the Ninth Circuit.

[Endorsed]: Filed February 10, 1949. Paul P.  
O'Brien, Clerk.